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SUPREME COURT, U.S.
FILED

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No.

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In the Supreme Court of the United States

UNITED PHOSPHORUS, LTD., ET AL.,

PETITIONERS,

v.

ANGUS CHEMICAL COMPANY, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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126 pp

QUESTION PRESENTED

Whether the nexus to U.S. interstate or domestic commerce required by 15 U.S.C. §§ 1 and 6a in antitrust cases is merely an element of the substantive federal claim or instead, as the Seventh Circuit held in this international antitrust case, a prerequisite to the subject matter jurisdiction of the federal courts.

LIST OF PARTIES

The petitioners are United Phosphorus, Ltd., Shroff's United Chemicals, Ltd., and J.C. Miller & Associates, Inc. The respondents are ANGUS Chemical Company; Angus Chemie GmbH; the Estate of Freeman Hughes, through its representative Yvonne Hughes; Ollie W. Chandler; Lowell Pals; Gary W. Granzow; D.B. Gupta; and Lupin Laboratories, Ltd.

RULE 29.6 STATEMENT

Petitioners United Phosphorus, Ltd. and Shroff's United Chemicals, Ltd. are both corporations organized under the laws of India. Petitioner J.C. Miller & Associates, Inc. is a corporation organized under the laws of Illinois. None of the petitioners has a parent company or a publicly held company that owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The District Court's opinion (Pet. App. 42a-79a) is published at 131 F. Supp. 2d 1003. The Seventh Circuit's opinion (Pet. App. 1a-41a) is published at 322 F.3d 942.

JURISDICTION

The judgment of the Court of Appeals, sitting *en banc*, was entered on March 10, 2003. Justice Stevens extended the time to file this Petition to and including August 7, 2003. Applic. No. 02A1004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 80a-81a) reproduces the provisions of 28 U.S.C. § 1337(a), 15 U.S.C. § 1, and 15 U.S.C. § 6a involved in this case.

STATEMENT OF THE CASE

Statement of Facts

This is an international antitrust case. Petitioners are a consortium of Indian and United States corporations that planned a joint venture in the early 1990s to manufacture various chemicals, called nitroparaffins and nitroparaffin derivatives, in India for sale worldwide. Respondent ANGUS Chemical Company ("ANGUS") had, and continues to have, a monopoly over the United States and world markets for the nitroparaffin 1-NP and the nitroparaffin derivatives AB, Tris Amino and AMP.[1] The United States is the largest market for ANGUS's products. R. 431/X(B) Ex. T at 34. Respondent Lupin Laboratories, Ltd. ("Lupin") has approximately 70% of the world market

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[1] *See* 1-NP (R. 431/I Leffler Dep. at 71, 82-86; R. 431/VII at 6-7); AB (R. 431/I Leffler Dep. at 71-82; R. 431/VII at 6-7); Tris Amino (R. 431/I Leffler Dep. at 71, 87-94; R. 431/VII at 7); and AMP (R. 431/I Chandler Dep. at 145-46, Granzow Dep. at 138-39, Nocito Dep. at 150-51). These and similar citations are to the record filed in the Court of Appeals.

for ethambutol, an anti-tuberculosis drug that it makes with AB purchased from ANGUS.[2]

In July 1991, it was announced, in a Bombay newspaper article and a newspaper advertisement, that petitioner United Phosphorus, Ltd. ("UPL") was setting up a plant in Vapi, India to manufacture AB. R. 431/III Defs.' Exs. 11, 25; R. 431/V Pls.' Ex. 63. The Chairman and Managing Director of Lupin, D.B. Gupta, sent a fax to ANGUS that expressed alarm at this prospect and urged ANGUS to immediately enter into a joint venture with Lupin to manufacture AB. R. 431/V Pls.' Ex. 10. Lupin stated that AB was a strategic product for both ANGUS and Lupin in light of their respective stakes in the AB and ethambutol world markets, Lupin "in no way" could allow AB to be manufactured in India "by anyone other than us," and that "the time has come now to take up this project on emergency basis [sic] to block any other entrant." *Id.*

Within a month, ANGUS filed a lawsuit against petitioners UPL and Shroff's United Chemicals, Ltd. ("SUCL"), Rajju Shroff, and Dr. John Miller[3] in the Circuit Court of Cook County, Illinois (the "Cook County lawsuit"), alleging that they had misappropriated ANGUS trade secrets concerning 1-NP and AB. R. 415 Ex. E. Freeman Hughes, ANGUS's Director of International Sales, reported back to Gupta the following day that: ANGUS had filed the lawsuit, "Shroff's AB plans" had surely been "slowed considerably," and ANGUS would keep Lupin "informed as changes happen." R. 431/V Pls.' Ex. 11.

Two years later, ANGUS voluntarily dismissed the Cook County lawsuit, despite having obtained no relief

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[2] R. 431/I Gupta Dep. at 361-63; R. 431/II at L00697, L00702.

[3] Mr. Shroff is the Managing Director of both UPL and SUCL. Dr. Miller is President of J.C. Miller & Associates, Inc., an Illinois corporation.

against petitioners, Shroff, or Dr. Miller. R. 431/X(A) Exs. L-M.

Proceedings Below

1. Following ANGUS's voluntary dismissal of the Cook County lawsuit, petitioners brought suit against respondents in the United States District Court for the Northern District of Illinois, alleging violations of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, and a pendent Illinois tort-law claim. R. 1. Petitioners alleged that the Cook County lawsuit was a sham and that, but for that and other anticompetitive conduct by respondents, petitioners would have competed with ANGUS in the United States and world markets for nitroparaffins and nitroparaffin derivatives.

The ANGUS respondents[4] moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). R. 4-5. Their Rule 12(b)(1) motion was based on 15 U.S.C. § 6(a), the Foreign Trade Antitrust Improvements Act ("FTAIA"), which provides that the Sherman Act "shall not apply" to non-import commerce with foreign nations[5] unless (1) "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic commerce, and (2) such effect "gives rise to a claim" under the Sherman Act. The district court denied the motion, holding that petitioners "have sufficiently alleged a direct, substantial and reasonably foreseeable

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[4] ANGUS, ANGUS Chemie GmbH, the Estate of Freeman Hughes (through its representative Yvonne Hughes), Ollie W. Chandler, Lowell Pals, and Gary W. Granzow will be collectively referred to as the "ANGUS respondents."

[5] Petitioners will use "non-import commerce with foreign nations" as shorthand for both export commerce and commerce taking place entirely overseas. The FTAIA treats *import* trade or commerce with foreign nations differently, but these complexities are not relevant to the issues presented here.

effect on domestic commerce" and that the court "ha[s] subject matter and supplemental jurisdiction over this entire action." *United Phosphorus, Ltd. v. ANGUS Chem. Co.*, No. 94 C 2078, 1994 U.S. Dist. LEXIS 14786, at *35 (N.D. Ill. Oct. 13, 1994).[6]

All parties consented to entry of final judgment by a magistrate judge. After several years and extensive discovery (including 24 depositions and the production of more than 35,000 pages of documents), respondents filed renewed motions to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and alternatively for summary judgment under Fed. R. Civ. P. 56. Petitioners argued that respondents' motions must be evaluated under the standards of Rule 56, not Rule 12(b)(1), because the nexus to domestic commerce required by 15 U.S.C. § 6a goes to the existence of a viable cause of action rather than to subject-matter jurisdiction.

Petitioners also demonstrated that, under the proper Rule 56 standard, numerous genuine issues of material fact foreclosed the entry of summary judgment for respondents. Petitioners disagreed with virtually every fact alleged by respondents, offered 315 additional facts that they contended should defeat respondents' motions, and backed it all up with extensive record citations, 400 pages of memoranda, and 5,000 pages of evidentiary exhibits. R. 429-31, 435, 462.

For example, respondents contended, and the magistrate judge ultimately found, that the claims alleging

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[6] The district court also denied the Fed. R. Civ. P. 12(b)(2) motion of Lupin and Mr. Gupta (collectively, the "Lupin respondents") to dismiss them from the case for lack of personal jurisdiction, holding that the record supports an inference that the ANGUS and Lupin respondents engaged in an antitrust conspiracy against petitioners, and performed substantial acts in Illinois in furtherance thereof. *United Phosphorus, Ltd. v. ANGUS Chem. Co.*, 43 F. Supp. 2d 904, 913-15 (N.D. Ill. 1999).

exclusionary conduct in the Tris Amino and AMP markets should be dismissed because petitioners had no plans to manufacture or sell Tris Amino or AMP. Pet. App. 64a-65a. Yet undisputed documentary evidence in the record showed that Dr. Miller stated at the very outset of his relationship with Shroff that he wanted to make Tris Amino for UPL, that the market for it was 2-4 million pounds annually, and that "this would be a product sold mainly in the U.S." R. 431/III Defs.' Ex. 4; R. 431/I Klim Dep. at 75-84, Miller Dep. at 112, 115, 141, 165-66. Eugene Klim, then acting as the intermediary between Dr. Miller and Shroff, responded that Shroff was interested in the Tris Amino project. R. 431/III Defs.' Ex. 72. And respondent ANGUS itself admitted in its First Amended Verified Complaint in the Cook County lawsuit that UPL, SUCL, and Dr. Miller intended to manufacture Tris Amino and AMP. R. 431/X(A) Ex. H ¶¶ 41, 49, 51, 54, 62. Respondent Lowell Pals verified that Complaint. *Id.* at 28. Under Seventh Circuit caselaw, that Complaint operates as an evidentiary admission in this case. *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 365 (7th Cir. 1990); *Walaschek & Assocs., Inc. v. Crow*, 733 F.2d 51, 54 (7th Cir. 1984); *Enquip, Inc. v. Smith-McDonald Corp.*, 655 F.2d 115, 118 (7th Cir. 1981).

The record developed in the trial court accordingly demonstrated that a reasonable jury could conclude that: (1) respondents ANGUS and Pals had told the truth when they pled that petitioners intended to manufacture Tris Amino and AMP; (2) but for the sham Cook County lawsuit and ANGUS's threats of further litigation if petitioners persisted in their plans to enter the nitroparaffin and nitroparaffin derivatives markets,[7] petitioners would have manufactured those chemicals and sold them in the United

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[7] R. 431/II at D022894; R. 431/I Miller Dep. at 666, Pals Dep. at 129, Shroff Dep. at 704-05.

States; and (3) petitioners' sales of those chemicals would have had an effect on United States commerce sufficient to satisfy the FTAIA. (ANGUS sells almost $30 million of Tris Amino and AMP annually in the United States, which is the primary market for them. R. 429 at 16-17.)

The magistrate judge nevertheless resolved these factual issues himself, because he concluded that the FTAIA governs subject-matter jurisdiction, and is not merely an element of an antitrust plaintiff's claim. Pet App. 72a-75a. The magistrate judge cited Seventh Circuit caselaw for the proposition that on a Rule 12(b)(1) motion the court is entitled to weigh the evidence before it. *Id.* at 46a n.1. He then credited all of the facts alleged by respondents, making no mention of petitioners' denial of those alleged facts, or of the 315 additional facts petitioners had cited in opposition to respondents' motions. The magistrate judge then concluded that the evidence did not show the impact on United States commerce required by the FTAIA, and thus granted respondents' Rule 12(b)(1) motions. *Id.* at 78a-79a.[8]

2. On appeal, petitioners again argued that the nexus to domestic commerce required by the FTAIA does not go to subject-matter jurisdiction, but rather furnishes an element of their antitrust claim that they must prove in order to prevail at trial. Petitioners argued that

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[8] The accompanying minute order recited that the court was granting respondents' "motions to dismiss for lack of jurisdiction and for summary judgment." R. 468. However, the opinion makes clear that the court decided the case solely on the basis of respondents' Rule 12(b)(1) motions, not their Rule 56 motions. Pet. App. 42a, 46a, 79a (conclusion). Immediately after reciting that respondents' "motion to dismiss Counts I and II of the second amended complaint for lack of subject matter jurisdiction is granted," *id.* at 79a, the magistrate judge noted that it was accordingly "unnecessary to consider the other motion argument(s) of [respondents]." *Id.* at 79a n.11. In context, it is thus clear that the magistrate judge only granted respondents' Rule 12(b)(1) motions based on the FTAIA, and did not rule on their Rule 56 motions.

respondents' motions based on the FTAIA should therefore have been evaluated under summary judgment standards, and should have been denied in light of the many genuine issues of material fact presented by the record.

The Seventh Circuit, after briefing and oral argument, *sua sponte* ordered the case reheard *en banc*. The *en banc* court held, by a 5-4 vote, that the FTAIA goes to subject-matter jurisdiction rather than furnishing an element of a plaintiff's antitrust claim. Pet. App. 6a-17a. The majority acknowledged the "purity" of the position that subject matter jurisdiction exists over any claim arising under a federal statute, and that it "might seem desirable to have no messy extra jurisdictional requirements." Pet. App. 12a-13a, 15a. It nonetheless felt constrained to conclude that the commerce nexus requirement in 15 U.S.C. § 6a is "jurisdictional," for several reasons.

First, the majority believed itself to be bound by this Court's divided decision in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). In a dissenting opinion in *Hartford Fire*, Justice Scalia (joined by Justices O'Connor, Kennedy and Thomas) argued forcefully that the nexus to U.S. commerce required by the Sherman Act in extraterritorial antitrust cases "has nothing to do with the jurisdiction of the courts," but is instead a "question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct." 509 U.S. at 813 (Scalia, J., dissenting). Although the Seventh Circuit majority noted that this Court's opinion in *Hartford Fire* "is not entirely clear," it concluded that this Court had rejected the dissenters' reasoning on that issue. Pet. App. 8a.

Second, the Seventh Circuit majority held that domestic cases decided under the Sherman Act's parallel requirement of a nexus to domestic *interstate* commerce "shed some light by analogy." *Id.* at 8a-9a. The majority

noted that this Court had described the interstate commerce requirement as "the jurisdictional element of a Sherman Act violation" in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242 (1980), and that it had used similar language in *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 333 (1991). Pet. App. 9a-10a.

Third, the majority found support among various commentators. It relied on the fact that the American Bar Association and federal regulatory agencies also "tend to discuss FTAIA in terms of jurisdiction." *Id.* at 11a.

Having concluded that the issue is jurisdictional, the Seventh Circuit majority held that the district court under Fed. R. Civ. P. 12(b)(1) had the power to weigh the evidence and make findings of fact, and that the district court's findings of fact were not clearly erroneous. *Id.* at 17a-18a.

The Seventh Circuit recognized, however, that this case would have been decided differently if the FTAIA were held not to go to subject-matter jurisdiction. The court noted that in this case, "[t]he primary issue involves whether the relevant provision of FTAIA is jurisdictional or whether it states an additional element of a Sherman Act claim. This in turn affects how a court deals with it and, *in this case, what the outcome will be.*" *Id.* at 2a (emphasis added). "We think it is fair to say that in this case the procedure employed will dictate the result." *Id.* at 5a.

Judge Diane Wood, writing for four judges, dissented. *Id.* at 18a-41a. She noted that the FTAIA's plain language supports the proposition that it is an element of the claim, especially when contrasted to the language of true "jurisdiction-stripping" statutes. She pointed out that the majority's holding is inconsistent with this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). And she explained that that holding is inconsistent with the long history of extraterritorial application of the antitrust laws, and will have procedural consequences that

are perverse in light of the policies the FTAIA and the federal antitrust laws were designed to further.

REASONS FOR GRANTING THE WRIT

This case presents an opportunity to decide, once and for all, whether the commerce nexus requirements of the FTAIA, Sherman Act and other federal antitrust laws are simply elements of a plaintiff's cause of action—or instead fundamental limitations on the subject matter jurisdiction of the federal courts. This is a threshold question in every federal antitrust case; nonetheless it has perplexed the lower courts, scholarly commentators, and occasionally Justices of this Court for more than a century.

The Seventh Circuit held in this sharply divided *en banc* decision that a plaintiff's failure to prove a "direct, substantial, and reasonably foreseeable effect" on domestic commerce somehow retroactively strips the court of jurisdiction to entertain an FTAIA case at all. That holding cannot be reconciled with this Court's modern jurisprudence. The Seventh Circuit's error was, however, invited by imprecise language in this Court's Sherman Act opinions and by tension between what this Court has said on these issues and what it has actually done in the decided cases. The resulting confusion has left the lower courts in complete disarray, and only this Court can now restore coherence to the law in this area.

This issue is both important and timely. If the commerce nexus issues are truly jurisdictional rather than substantive, they will be resolved by judges rather than juries, can be raised at any point in the litigation process, and can never be waived or conceded. The issue therefore has important procedural and substantive consequences for every antitrust case. More broadly, however, similar commerce nexus requirements are embedded (explicitly or implicitly) in *every* federal cause of action or crime created

pursuant to Congress's Commerce Clause power. In the wake of *United States v. Lopez*, 514 U.S. 549 (1995), the lower courts have begun to wrestle, on an *ad hoc* statute-by-statute basis, with whether such requirements are jurisdictional or substantive. This Court can forestall legions of future circuit splits and habeas petitions by providing clear principles for resolving these issues.

I. THE SEVENTH CIRCUIT'S HOLDING CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW

Congress has expressly granted the federal district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies," under 28 U.S.C. § 1337(a). Jurisdiction over such actions is also provided, of course, by the general federal question statute, 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Both provisions independently grant subject matter jurisdiction, *inter alia*, over claims arising under Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

For many decades (up to and including this Court's decision in *Hartford Fire*), the extraterritorial reach of the Sherman Act was defined solely by that quoted language from 15 U.S.C. § 1, as interpreted in light of general principles of international law. *See, e.g., Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993). In the 1982

FTAIA, Congress added the clarification that the Sherman Act "shall not apply" to non-import trade or commerce with foreign nations unless (a) "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic commerce and (b) such effect "gives rise to a claim" under the Act. 15 U.S.C. § 6a. Congress did not amend 28 U.S.C. §§ 1337 or 1331.

The plain language of the FTAIA, particularly when placed in its full statutory context, leaves no doubt that its requirements simply clarify[9] or amend the cause of action created by the Sherman Act—and have nothing whatsoever to do with the jurisdiction of the federal courts. The FTAIA provides that the Sherman Act "shall not apply" to certain conduct; it is hard to imagine a clearer limitation on the substantive scope of the statute. And the requirement of a sufficient impact on "trade or commerce among the several States, or with foreign nations" that the FTAIA clarifies is analytically indistinguishable from the requirement of a "contract, combination ... or conspiracy" and the requirement that it be unreasonably "in restraint of trade" in 15 U.S.C. § 1; all three are clearly elements that must be proven to establish a violation of § 1 of the Sherman Act.

As the heavily litigated jurisdiction-stripping provisions of the recent Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, illustrate, Congress knows perfectly well how to take subject matter jurisdiction away from the federal courts explicitly when that is its intent. *Dozens* of federal statutes,

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[9] In this Court's only encounter to date with the FTAIA, it speculated that the statute may simply codify prior judicial interpretation of the Sherman Act's commerce nexus provisions in extraterritorial cases. *See Hartford Fire*, 509 U.S. at 796 n.23.

unlike the FTAIA, state that "no court shall have jurisdiction" over certain kinds of actions,[10] or that no action may be "'brought under section 1331 ... of title 28'" in particular circumstances.[11] And 28 U.S.C. § 1337 itself explicitly imposes a jurisdictional amount-in-controversy requirement for certain claims, but says nothing whatsoever about the commerce nexus requirements at issue here.

This Court has also established a strong interpretive presumption that "arising under" jurisdictional statutes grant jurisdiction over any nonfrivolous claim that federal law has been violated. It is settled law that a federal court has *jurisdiction* whenever "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 685, 682-83 (1946). In other words, the subject matter jurisdiction of the federal courts is the "authority to decide the case either way." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). The fact that a federal court ultimately rules that the plaintiff has no cause of action under federal law—*or even that Congress has exceeded its constitutional authority to legislate in the*

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[10] *See, e.g.*, 8 U.S.C. §§ 1158(a)(3), 1182(a)(9)(B)(v), 1182(d)(12)(B), 1182(h), 1182(i)(2), 1187(c)(6), 1227(a)(3)(C)(ii), 1229c(f), 1252(a)(2)(A)-(C), 1255a(f)(4)(C); 12 U.S.C. §§ 1467a(g)(5)(B), 1786(k)(1), 1787(b)(13)(D), 1818(i)(1), 1821(d)(13)(D), 1844(e)(2), 2267, 4208, 4228, 4242, 4584(b), 4623(d), 4635(b); 15 U.S.C. §§ 717z(g)(1), 719h(c)(3), 2703(f)(3), 3416(c); 16 U.S.C. §§ 824k(f)(3), 3168; 22 U.S.C. § 6450; 25 U.S.C. § 1775h(b); 31 U.S.C. § 3730(e)(1), (e)(2)(A), (e)(4)(A); 39 U.S.C. § 3628; 42 U.S.C. §§ 2184, 9622(e)(3)(C); 43 U.S.C. § 2011(c).

[11] *See Shalala v. Illinois Long Term Care, Inc.*, 529 U.S. 1, 5 (2000) (construing 42 U.S.C. § 405(h), as incorporated by 42 U.S.C. § 1395ii) (alteration in original).

area—does not retroactively compromise the court's jurisdiction to hear the case. *See, e.g.*, 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350, at 196 n.8 (2d ed. 1990); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

This Court recently applied that presumption to statutory language that appeared to be far more "jurisdictional" than anything in 15 U.S.C. §§ 1 or 6a. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), this Court considered the citizen-suit provisions of the Emergency Planning and Community Right-To-Know Act of 1986, Pub. L. No. 99-499, 100 Stat. 1755. As codified, 42 U.S.C. § 11046(a) creates a private right of action to enforce certain environmental reporting requirements. Section 11046(c) then provides that "[t]he district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement."

In a concurring opinion in *Steel Co.*, Justices Stevens and Souter concluded that the phrasing of § 11046(c) renders the elements of § 11046(a) "jurisdictional." This Court squarely rejected that reasoning. Noting that "jurisdiction ... is a word of many, too many, meanings," this Court explained that it would be "unreasonable to read [§ 11046(c)] as making all of the elements of the cause of action under subsection (a) jurisdictional" in the sense of *subject matter jurisdiction.* 523 U.S. at 90 (citations omitted). Notwithstanding the explicit reference to "jurisdiction" in the statute, this Court held that § 11046(c) should be read as merely specifying the remedial powers of the court. *Id.* "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate

subject-matter jurisdiction ...." *Id.* at 89. This Court also emphasized that "even if there were not solid precedent contradicting JUSTICE STEVENS' position, the consequences alone are enough to condemn it"—since the concurrence's view "would turn every statutory question in an EPCRA citizen suit into a question of jurisdiction" that could not be waived and would have to be raised *sua sponte* by the courts. *Id.* at 92-93. "Congress of course did not create such a strange scheme." *Id.* at 93.

This Court reiterated those principles in *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). *Verizon Md.* considered a provision of the Telecommunications Act of 1996 that authorized any person aggrieved by certain actions of State regulators to "bring an action in an appropriate Federal district court" under certain conditions. 47 U.S.C. § 252(e)(6). The FCC argued that if those conditions were not satisfied, the federal courts lacked jurisdiction. Citing *Bell v. Hood* and *Steel Co.*, this Court again held that subject matter jurisdiction presumptively exists under 28 U.S.C. § 1331 over any non-frivolous claim that federal law has been violated—even if the court ultimately decides that the plaintiff has no cause of action. *Verizon Md.*, 535 U.S. at 642-43. This Court rejected the FCC's suggestion that 47 U.S.C. § 252(e)(6) implicitly amended § 1331 to strip jurisdiction over certain claims, noting that "where otherwise applicable jurisdiction was meant to be excluded, it was excluded expressly" by Congress. *Id.* at 644 (citing 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review ....")). This Court concluded that "nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331," and that it "will not presume that the statute means what it neither says nor fairly implies." *Id.*

"Jurisdictional" interpretations of statutes specifying the substantive reach of federal law are therefore strongly disfavored. This Court was not willing to compromise that interpretive presumption in *Steel Co.* or *Verizon Md.*. It is clearly inappropriate to abandon it for a statute that merely provides that the Sherman Act "shall not apply" in certain circumstances. The Seventh Circuit's holding in this case will produce the same bizarre jurisprudential consequences as the interpretation rejected in *Steel Co.*, with far less textual justification.[12] Jurisdiction in foreign commerce antitrust cases would depend quite explicitly on the merits of the plaintiff's case, particularly since the FTAIA is satisfied only by a substantial effect on domestic commerce that also "gives rise to a claim" under the Sherman Act. And any argument that the FTAIA impliedly amends 28 U.S.C. §§ 1331 and 1337 is far weaker than the parallel argument advanced by the FCC in *Verizon Md.* and squarely rejected by this Court.

Even if the matter were at all close, however, it ought to be resolved in this case by the doctrine of constitutional doubt. The Sherman Act specifies the

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[12] Nothing in the FTAIA's legislative history requires a different result. The Seventh Circuit majority cited a House Committee report indicating that the purpose of the FTAIA was to clarify the reach of "United States antitrust jurisdiction over international transactions" or the "jurisdiction of the United States antitrust laws." H.R. Rep. No. 97-686, at 2, 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487, 2496. These are obviously references to the substantive scope of the antitrust laws vis-à-vis extraterritorial conduct, not to the jurisdiction of the federal courts. The Report also states that the bill was not "intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace." *Id.* at 11, *reprinted in* 1982 U.S.C.C.A.N. at 2496. But subject matter jurisdiction in the judicial sense is conferred on *courts*, not persons. *See United States v. Morton*, 467 U.S. 822, 828 (1984). Regardless, the meaning of a statute is found in its plain language, not in committee reports. *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337-38 (1994).

elements of a federal cause of action for unreasonable restraints on trade—but the same statutory language also delineates the boundaries of a serious federal *crime*. By stating that the Sherman Act "shall not apply," 15 U.S.C. § 6a means that no one can be convicted of antitrust crimes in a case involving non-import commerce with foreign nations unless his or her conduct had a "direct, substantial and reasonably foreseeable effect" on domestic commerce and that effect gives rise to a claim under the Sherman Act. Under this Court's recent jurisprudence, any fact that affects a defendant's maximum exposure to criminal punishment *must* be treated as a substantive element of the crime and submitted to the jury for proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). It would, therefore, be unconstitutional in a criminal case to treat the requirements of 15 U.S.C. § 6a as threshold "jurisdictional" issues for the court to resolve, rather than as elements of the substantive offence. And since the *exact same language* governs this issue in civil cases as in criminal ones, there can be no justification for a different conclusion here. *See United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

II. THE SEVENTH CIRCUIT'S HOLDING REFLECTS A DEEP AND LONGSTANDING CONFUSION IN ANTITRUST LAW THAT ONLY THIS COURT CAN RESOLVE

The Seventh Circuit majority essentially concedes that its holding would make little sense on a blank slate.[13]

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[13] *See, e.g.*, Pet. App. 12a-13a (acknowledging "the purity of an argument that 28 U.S.C. § 1331 provides federal question jurisdiction for cases 'arising under the Constitution, laws, or treaties of the United States' so that without more, the federal courts have jurisdiction over Sherman Act claims"); *id.* at 15a (noting that "it might seem desirable to have no messy extra jurisdictional requirements under some acts of Congress, but not others ...").

That court apparently felt constrained, however, by imprecise language appearing in this Court's cases, scholarly commentary, other lower court opinions, administrative guidelines, and the legislative history—to the effect that the FTAIA's commerce nexus requirements are in some sense "jurisdictional."

The use of "jurisdictional" terminology in this context has a long and confusing pedigree, stretching back to the very earliest cases decided under the commerce nexus provisions in 15 U.S.C. § 1. Because the FTAIA was designed to amend (or merely to codify) that Sherman Act jurisprudence, it is not surprising that the uncertainty in those cases has infected judicial interpretation of the FTAIA. Indeed, the *en banc* Seventh Circuit cited several of this Court's cases decided under 15 U.S.C. § 1 as persuasive (or even controlling) authority on whether the additional requirements of § 6a are "jurisdictional," including *Hartford Fire*, *McLain*, and *Summit Health*. Petitioner respectfully submits that a brief history of the key cases in this area will illuminate why the Seventh Circuit majority went awry, why the lower courts remain so confused on this issue, and why this Court's intervention is essential to end the disarray.

A. This Court's Sherman Act Cases Have, For Many Decades, Imprecisely Distinguished Between Legislative And Judicial "Jurisdiction"

Questions about the scope of Congress's power under the Commerce Clause were very prominent in this Court's earliest Sherman Act cases, and that issue was often framed in terms of whether Congress had "jurisdiction" over the commercial activity in question. Thus in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), the defendants argued that Congress (and hence the Sherman

Act) could preempt State law but had no power to interfere with restraints created by private contract. Although its opinion focused on Congressional power under the Commerce Clause, the district court appears to have dismissed the indictment for lack of subject matter jurisdiction. *United States v. Addyston Pipe & Steel Co.*, 78 F. 712, 724 (E.D. Tenn. 1897) ("[I]n a suit such as this, in the name of the United States, jurisdiction depends alone upon the act giving jurisdiction to enforce its provisions ...."). This Court held that "there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of [Congress]," and that "[i]t is essential to the proper execution of that power that Congress should have jurisdiction as much in the one case as in the other." 175 U.S. at 228-31.

Similar language appears throughout the early cases[14]—and although the subject was in fact the *legislative* "jurisdiction" of Congress under the Commerce Clause, there appears to have been considerable confusion concerning whether the subject matter jurisdiction of the courts was also implicated. Some courts dismissed purely local complaints for lack of jurisdiction; other courts treated the issue purely as failure to state a claim. *See, e.g., Am. Banana*, 213 U.S. at 357-59 (defendants' actions outside the United States are "not within the scope of the [Sherman Act]," so the complaint "alleges no case under the Act.")

In *Binderup v. Pathe Exchange, Inc.*, 280 F. 301 (8th Cir. 1922), the Eighth Circuit held that the district court lacked subject matter jurisdiction over a Sherman Act complaint because the conduct alleged was not in interstate

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[14] *See, e.g., United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 324 (1897) ("Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce.").

commerce. This Court reversed, squarely rejecting the lower courts' assumption "that an unsuccessful attempt to allege facts sufficient to constitute a cause of action under a federal statute constitutes a jurisdictional defect." *Binderup v. Pathe Exch., Inc.*, 263 U.S. 291, 305 (1923). This Court explained that any complaint "setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court," and that "[j]urisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous ...." *Id.* at 305-06. This Court then held that the commerce nexus issue went not to jurisdiction, but instead simply to "whether the averments of the complaint are sufficient to constitute a cause of action under the Anti-Trust Act." *Id.* at 309.

The clarity of *Binderup v. Pathe Exchange* was, however, soon lost. In *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), this Court again used language suggesting that the substantive scope of the Sherman Act is a question of federal subject matter jurisdiction:

> But in this suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws. Their only jurisdiction is to vindicate such federal right as Congress has conferred on petitioner by the Sherman Act and violence, as will appear hereafter, however reprehensible, does not give the federal courts jurisdiction.

Apex, 310 U.S. at 483-84. The lower courts, predictably, lapsed back into disarray. *See infra* § II(B).

In *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), this Court again pervasively described the commerce nexus requirements of the Sherman, Clayton and Robinson-Patman Acts as "jurisdictional." In a footnote, however, the

Court acknowledged some ambivalence as to whether in fact "the interstate commerce requirements of §§ 3 and 7 are properly deemed issues of subject-matter jurisdiction, rather than simply necessary elements of the federal claims." *Gulf Oil*, 419 U.S. at 203 n.19. The Court found it unnecessary to resolve this issue because the plaintiff had not objected to the use of summary judgment procedures—and there was, in any event, "an identity between the 'jurisdictional' issues and certain issues on the merits, and hence, under *Land v. Dollar*, 330 U.S. 731 (1947), no objection to reserving the jurisdictional issues until a hearing on the merits." *Id.*[15]

Similarly, in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976), this Court again expressly declined to decide whether the issue in a commerce nexus challenge is failure to state a claim or failure of subject matter jurisdiction. Because the claim had been dismissed on the pleadings, under either Rule 12(b)(1) or 12(b)(6) "the critical inquiry is into the adequacy of the nexus between respondents' conduct and interstate commerce that is alleged in the complaint." 425 U.S. at 742 n.1. This Court cautioned that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' ... dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Id.* at 746 (citation omitted). The Court did not, however, clarify whether after such discovery the issue should be decided by the trier of fact on the merits—or instead by the judge as a question of threshold "jurisdictional fact."

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[15] Justice Douglas, joined by Justice Brennan, wrote a dissenting opinion which makes clear, *inter alia*, their belief that any non-frivolous claim under federal law establishes federal jurisdiction, 419 U.S. at 213 n.9, and that the commerce nexus issues are in any event so intertwined with the merits that judicial factfinding in the context of a pretrial motion to dismiss is always inappropriate, *id.* at 213 n.10.

In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), the district court had dismissed the case for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The Fifth Circuit affirmed, but held that the outcome was more appropriately characterized as a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). This Court once again noted that disagreement, *McLain*, 444 U.S. at 240-41, but never squarely resolved it. Instead, the *McLain* Court described the issue as jurisdictional but then held that "[o]n the record thus far made, it cannot be said that there is an insufficient basis for petitioners to proceed *at trial* to establish Sherman Act jurisdiction," and that "*[a]t trial*, respondents will have the opportunity, if they so choose, to make their own case contradicting this factual showing." *Id.* at 245 (emphasis added). Later in its opinion the Court wrote that "one of the requisites of a [Sherman Act] *cause of action* is the existence of a demonstrable nexus between the defendants' activity and interstate commerce," but then in the very next sentence that "what was submitted to the District Court shows a sufficient basis for satisfying the Act's *jurisdictional* requirements under the effect-on-commerce theory." *Id.* at 246 (emphasis added). The tension between these various statements was not resolved.

When squarely confronted with this issue, the district court in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1161, 1172-73 (E.D. Pa. 1980), felt compelled to "extend [its] opinion by a few pages to draw attention to the confused and anomalous state of the law in this area, in the hope that future commentary and judicial decision may ultimately provide clarification."[16]

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[16] This Court eventually granted review in *Zenith Radio*, but did not address these questions. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

"Although the requirement that activities be 'in commerce' ... is always said to be a prerequisite for federal jurisdiction under the Sherman Act," the court wrote, "it is unclear why this is so." *Id.* at 1171-72 n.21 (citations omitted). The court's own reasoned analysis led it to conclude that, because jurisdiction exists over any non-frivolous complaint alleging a violation of federal law, "the lack of a nexus with interstate commerce should be treated as a failure to state a claim under the Act, and not as a jurisdictional defect." *Id.* at 1172 n.21. Nonetheless, the court felt constrained by "well-established precedent" to reach the opposite conclusion. *Id.* After attempting to untangle the precedents concerning whether this supposedly "jurisdictional" issue should be decided by the judge or jury, the *Matsushita* court concluded that "the law in this area is a patchwork," and expressed the hope that its "discussion will be helpful to judges and scholars dealing with these problems and that in due course clearer principles will emerge." *Id.* at 1176-77.

This question surfaced once again in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), which considered the application of the Sherman Act to the conduct of certain London reinsurers that took place entirely overseas.[17] The *Hartford Fire* majority noted in passing "that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede," because "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 795-96. The Court also noted the potential relevance of the

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[17] This Court's intervening decision in *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991), described the issue as "jurisdictional," but since (as in *Rex Hospital*) the case arose in the context of a motion to dismiss on the pleadings, the distinction affected nothing and was not discussed.

FTAIA, but held that it need not address whether the statute applied—or whether the FTAIA's "'direct, substantial, and reasonably foreseeable effect' standard amends existing law [under § 1 of the Sherman Act] or merely codifies it"—because either way the conduct alleged plainly met the statutory requirements. 509 U.S. at 796 n.23.

Justice Scalia, joined by Justices O'Connor, Kennedy and Thomas, filed an opinion dissenting from the Court's substantive holding in *Hartford Fire*. Before discussing the merits, however, the dissenters noted their belief that:

> the extraterritorial reach of the Sherman Act ... has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct. ... If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction—want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute.

509 U.S. at 813 (Scalia, J., dissenting). In a footnote, the *Hartford Fire* majority acknowledged that "JUSTICE SCALIA believes that what is at issue in this litigation is prescriptive, as opposed to subject-matter, jurisdiction." *Id.* at 796 n.22. Echoing its earlier comment that the London reinsurers "apparently concede" jurisdiction, the Court responded only that "*[t]he parties do not question prescriptive jurisdiction, however*, and for good reason: it is well established that Congress has exercised such jurisdiction under the Sherman Act." *Id.* (emphasis added).

That response needs clarification. Certainly Congress exercised its "prescriptive jurisdiction" (i.e.,

legislative power) when enacting the Sherman Act and the FTAIA; that does not, however, speak to whether in so doing Congress intended to delimit the scope of a federal cause of action or instead the scope of the jurisdiction of the federal courts. And if the latter, the Court's apparent reliance on a concession or waiver by the defendants was unorthodox—since subject matter jurisdiction cannot ordinarily be waived or conceded. After reviewing the various opinions in *Hartford Fire*, the Seventh Circuit majority in this case nonetheless concluded that the majority had rejected Justice Scalia's position on this issue. Pet. App. 8a, 14a-15a.

That remained the state of the law until *Steel Co.* and *Verizon Md.*, which forcefully reasserted the traditional view that federal subject matter jurisdiction exists over any non-frivolous claim that federal law has been violated. Of particular interest in this context, *Steel Co.* also held that cases assuming without reasoned discussion that an issue is jurisdictional (so-called "drive-by jurisdictional rulings") have "no precedential effect" whatsoever. 523 U.S. at 91. Nothing in *Steel Co.* or *Verizon Md.* suggests that they do not apply with equal force in the antitrust context—where, indeed, this Court's apparently forgotten decision in *Binderup* had articulated precisely the same principles 75 years earlier. Despite the clarity of the principles articulated in those cases, the lower courts apparently believe that they are bound by imprecise language in *Hartford Fire* in the context of antitrust claims.

B. The Lower Courts Are In Disarray

All of the court of appeals decisions interpreting the FTAIA so far have described its requirements using "jurisdictional" language. *See* Pet. App. 13a-14a (collecting cases). As Judge Wood's thoughtful dissent explains, however, many (if not all) of those cases failed to recognize

or discuss the issue and therefore may be "drive-by jurisdictional rulings" not entitled to precedential effect under *Steel Co.*. Pet. App. 35a-38a (Wood, J., dissenting). In addition, the practical consequences of a "jurisdictional" characterization appear to vary significantly across the circuits, in ways that trace back to the ways that those courts treat commerce nexus challenges under 15 U.S.C. § 1. And on that issue, the lower courts are deeply divided.

The Sixth, Seventh, and Eighth Circuits have now squarely held that the commerce nexus requirements under 15 U.S.C. § 1 are jurisdictional in nature.[18] That appears to be the law in the Tenth and Eleventh Circuits as well.[19] By contrast, the First, Second and Fourth Circuits have all held that the Section One commerce nexus requirements go to the merits of a Sherman Act claim and do not affect subject matter jurisdiction at all.[20]

A third group, composed of at least the Third, Fifth and Ninth Circuits, appear to have accepted a "jurisdictional" characterization of the issue but have largely avoided the consequences of that holding by adopting special procedural rules. Taking up this Court's hint in *Gulf Oil*, the Ninth Circuit has held that these "jurisdictional" issues are intermeshed with the merits and

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[18] *See A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n*, 484 F.2d 751 (7th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974); *Tarleton v. Meharry Med. Coll.*, 717 F.2d 1523, 1529 (6th Cir. 1983); *Godfrey v. Pulitzer Publ'g Co.*, 161 F.3d 1137 (8th Cir. 1998) (discussing 15 U.S.C. § 13a), *cert. denied*, 526 U.S. 1098 (1999).

[19] *Mac Adjustment, Inc. v. Gen. Adjustment Bureau, Inc.*, 597 F.2d 1318 (10th Cir.), *cert. denied*, 444 U.S. 929 (1979); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980); *Constr. Aggregate Transp., Inc. v. Fla. Rock Indus., Inc.*, 710 F.2d 752 (11th Cir. 1983).

[20] *See, e.g., Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 554 n.3 (2d Cir. 1977); *Mims v. Kemp*, 516 F.2d 21, 23 (4th Cir. 1975).

thus should be evaluated under summary judgment standards and submitted to the jury if a genuine issue of fact exists.[21] The Fifth Circuit appears to endorse a similar rule for most cases, while recognizing that the jurisdictional issues may sometimes be sufficiently extricated from the merits to permit pretrial dismissal.[22] And the Third Circuit has held that, because a Rule 12(b)(1) factual challenge "can unfairly preclude Sherman Act plaintiffs from reaching the merits of their cases, ... it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at a trial stage." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 892 (3d Cir. 1977).

The Third and Fifth Circuits have held that those special rules apply to FTAIA determinations as well as to

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[21] *See, e.g., Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 735 (9th Cir. 1979) ("[W]here the jurisdictional issues and the substantive issues are so intermeshed that the question of jurisdiction is dependent on a decision of the merits, a party is entitled to have the jurisdictional issue submitted to the jury, rather than have the court resolve factual issues.") (footnote omitted); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 602 (9th Cir. 1976) (in extraterritorial Sherman Act case, "a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous"); *cf. McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 814 & n.8 (9th Cir. 1988).

[22] *See McLain v. Real Estate Bd. of New Orleans, Inc.*, 583 F.2d 1315 (5th Cir. 1978), *vacated by* 444 U.S. 232 (1980); *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F3d 420, 424 (5th Cir. 2001) (citing *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981)), *cert. denied*, 534 U.S. 1127 (2002); *see also Williamson*, 645 F.2d at 415 ("Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court (assuming that the plaintiff's federal claim is not immaterial and made solely for the purpose of obtaining federal jurisdiction and is not insubstantial and frivolous) is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case. The Supreme Court has made it clear that in that situation no purpose is served by indirectly arguing the merits in the context of federal jurisdiction.") (footnote omitted)).

the commerce nexus requirements in 15 U.S.C. § 1. *See Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000); *Den Norske*, 241 F.3d at 424. As this case demonstrates, the Seventh Circuit also adheres to the same strictly "jurisdictional" treatment in FTAIA as in Sherman Act cases, permitting unencumbered judicial factfinding on the commerce nexus issues. But the Second and Fourth Circuit precedents appear to have divided—treating the commerce nexus elements in 15 U.S.C. § 1 as elements of the claim but those in § 6a as "jurisdictional."[23] As explained above, that position makes little sense given that the FTAIA simply amends (or perhaps merely codifies) the earlier case law decided under the Sherman Act. Those courts have not recognized the tension.

Suffice it to say that most thoughtful commentators to have considered the issue (including the *en banc* Seventh Circuit in this case) have concluded that the law is in serious disarray. Although the district court's explicit plea for guidance in *Zenith Radio Corp.* has gone largely unheeded, one widely-cited law review article did conclude that the "jurisdictional" characterization of these issues in the case law makes no sense. Comment, *Sherman Act "Jurisdiction" In Hospital Staff Exclusion Cases*, 132 U. Pa. L. Rev. 121 (1983). Areeda and Hovenkamp's treatise devotes more than 100 pages to the "jurisdictional" scope of the Sherman Act, IA Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 266-276, at 287-414 (2d ed. 2000), and frequently questions whether the issue should be "jurisdictional" at all. *See id.* ¶ 266, at 290 ("[T]he courts should deal with the substantive merits or *de minimis* aspects of a case directly, not in the guise of a jurisdictional determination."); *id.* at

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[23] *See Filetech, S.A. v. France Telecom, S.A.*, 157 F.3d 922 (2d Cir. 1998); *Dee-K Enters., Inc. v. Heveafil SDN. BHD*, 299 F.3d 281, 287 n.2 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2638 (2003).

318-20. Since the issue has been percolating, in this Court's opinions and in the lower courts, for more than a century now, there seems little chance that it will work itself out without this Court's intervention.[24]

III. THIS CASE RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE THAT MERIT REVIEW BY THIS COURT

Judge Wood's thoughtful opinion for the Seventh Circuit dissenters explains fully why this issue is important and merits review by this Court.[25] Briefly: if the nexus to U.S. interstate or foreign commerce required by the Sherman Act and FTAIA is an issue of subject matter jurisdiction, then it will be decided by judges rather than juries; will be reviewed for clear error rather than *de novo* on appeal; may be raised at any point in the litigation or even on habeas corpus review; and cannot be waived, conceded or defaulted—even by a guilty plea in a criminal case. A litigant that persuaded the district court that it had subject matter jurisdiction would thus be free, if it lost on the merits, to seek reversal (or later habeas corpus) on the ground that the court had actually lacked jurisdiction. *See Steel Co.*, 523 U.S. at 95 (discussing *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804)). Jurisdictional issues must always be decided first, and cannot merely be assumed to permit dismissal on an easier merits issue. And a dismissal

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[24] *See* Stephen L. Wasby, *Intercircuit Conflicts In The Courts Of Appeals*, 63 Mont. L. Rev. 119, 145-46 (2002) (noting "hydraulic pressure to adhere to the existing consensus" in such situations).

[25] The Seventh Circuit recognized that this issue is dispositive for this appeal because the evidence of a U.S. domestic effect clears the "genuine issue of material fact" summary judgment hurdle but is not sufficient to render the district court's findings of allegedly "jurisdictional" fact clearly erroneous. Pet. App. 2a. That conclusion is plainly correct, and in any event there is no reason for this Court to revisit the factbound application of those standards to this record.

for lack of jurisdiction also deprives the court of power to resolve pendent state law claims, and has different preclusive consequences than a decision on the merits.

These commerce nexus questions are also vastly more complex and fact-intensive than any conventional "jurisdictional" issue, such as diversity of citizenship or the well-pleaded complaint rule. The district court was able to determine that it lacked jurisdiction to entertain this action only after in fact presiding over six years of discovery, including 24 depositions and the production of 35,000 pages of documents (8,000 of which were submitted as exhibits). Pet. App. 2a; *see also id.* at 26a (Wood, J., dissenting) (recounting similar procedural history of *Timberlane*). And the court was able to stop its inquiry there only because it found a lack of sufficient effects on domestic commerce. If the court had found such effects, it would then have been forced to decide whether they "give[] rise to a claim" under the Sherman Act—i.e., completely decide the merits—all under the guise of determining whether it had jurisdiction to hear the case at all. 15 U.S.C. § 6a. It makes no sense to have the court's fundamental power to act turn on an inquiry that can only be resolved through the extensive exercise of that power. "Congress of course did not create such a strange scheme." *Steel Co.*, 523 U.S. at 93.

Finally, as Judge Wood pointed out, if these commerce nexus requirements are "jurisdictional" then this is not merely an antitrust problem. The exact same issue is implicit in *every* case, civil or criminal, arising under any federal statute enacted pursuant to Congress's Commerce Clause power. Pet. App. 40a. A clear answer to this jurisprudential problem is therefore essential, particularly in the criminal context. The Seventh Circuit's holding here invites (and, in criminal Sherman Act cases, requires) a treatment of commerce nexus elements that will violate

defendants' Fifth and Seventh Amendment rights under *Apprendi* and create a chaotic profusion of retroactivity and procedural default issues that this Court will eventually have to resolve. It would be better—for the coherence of the law, the rights of litigants, and the workload of the federal courts—for this Court to correct the Seventh Circuit's error now.

This case presents an exceptional vehicle for resolving these issues. Although this issue arises in every federal antitrust case (and many non-antitrust cases as well), the confusion in the case law is pervasive enough that the decisions squarely grasping it are few in number and separated by decades. The apparent confusion in the Second and Fourth Circuits also suggests that this issue should be resolved in an FTAIA case, because a holding limited to 15 U.S.C. § 1 might leave some doubt about the proper characterization of 15 U.S.C. § 6a. Every FTAIA case, by definition, raises the issue under both provisions.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 01-1693

UNITED PHOSPHORUS, LTD., an Indian corporation; SHROFF'S UNITED CHEMICALS, LTD., an Indian corporation; and J.C. MILLER & ASSOCIATES, INCORPORATED, an Illinois corporation, Plaintiffs-Appellants, v. ANGUS CHEMICAL COMPANY, a Delaware corporation; ANGUS CHEMIE GmbH, a German corporation; the ESTATE of FREEMAN HUGHES through its representative Yvonne Hughes; OLLIE W. CHANDLER; LOWELL PALS; GARY W. GRANZOW; D.B. GUPTA; and LUPIN LABORATORIES, LTD., an Indian corporation, Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94 C 2078

Argued: April 4, 2002
Reargued En Banc: Nov. 6, 2002
Decided: March 10, 2003*

322 F.3d 942

Before POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges. DIANE P. WOOD, Circuit Judge, dissenting, with whom Circuit Judges EASTERBROOK, MANION, and ROVNER join.

OPINION BY: EVANS

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*Chief Judge Flaum and Circuit Judge Williams did not participate in the consideration or decision of this case.

OPINION:

TERENCE T. EVANS, *Circuit Judge.*

Today, for the first time in this court, we encounter the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (FTAIA), a 1982 amendment to the Sherman Act, which affects its reach in foreign commerce. The primary issue involves whether the relevant provision of FTAIA is jurisdictional or whether it states an additional element of a Sherman Act claim. This in turn affects how a court deals with it and, in this case, what the outcome will be.

Plaintiffs United Phosphorus and Shroff's United Chemicals are chemical manufacturers based in India. J.C. Miller & Associates is an American firm, which was involved in a joint venture with the Indian plaintiffs. The defendants are Angus Chemical and its officers, Angus Chemie GmbH, and Lupin Laboratories—American companies or subsidiaries of American companies, which we will refer to collectively as Angus. The complaint alleges that Angus attempted to monopolize, did monopolize, and conspired to monopolize the market for certain chemicals, in violation of § 2 of the Sherman Act.

The issue of the court's subject matter jurisdiction was first raised soon after the case was filed in 1994. Angus' Rule 12(b)(1) motion was denied. Then, after considerable discovery (24 depositions and 8,000 pages of exhibits), Angus filed renewed motions to dismiss for lack of subject matter jurisdiction and for summary judgment in 2000. Angus contended that the court lacked subject matter jurisdiction under FTAIA, which, as relevant here, limits application of the Sherman Act to conduct with a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. After a thorough analysis of the facts, Magistrate Judge Ian H. Levin, sitting by consent, agreed with Angus and granted its motion to dismiss. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 131 F.Supp.2d 1003 (N.D.Ill.2001).

Briefly, to the facts. In their original 1994 complaint, the plaintiffs alleged that India had the "greatest incidence of tuberculosis in the world." That allegation is consistent with a report from the Centers for Disease Control, dated March 22, 2002, which says that every year approximately 2 million people in India develop tuberculosis, accounting for 25 percent of the world's new cases. The parties tell us that "Ethambutol" is a primary pharmaceutical for the treatment of the disease. The chemicals involved in its production are the subject of this lawsuit.

2-Amino-1 Butanol (AB) is the key ingredient of Ethambutol, and 1-Nitro-Propane (1-NP) is the raw material from which AB is made. To make Ethambutol, defendant Lupin uses AB, which it buys from defendant Chemie, currently the world's only manufacturer of AB. Chemie is a German subsidiary, wholly owned by defendant Angus. The AB is manufactured in Germany. Angus manufactures 1-NP at a plant in Louisiana and is the world's only manufacturer of 1-NP.

This lawsuit stems from prior trade-secret litigation involving several of the parties. In the early 1990's, the Indian plaintiffs decided to acquire the technology for making AB and 1-NP. They went to Dr. John Miller (owner of J.C. Miller & Associates), who also had been the vice-president of research and development at Angus and supervised Angus' efforts to improve its AB processes. When Angus learned what was going on, it sued Miller and the Indian entities (who are the plaintiffs here) in an Illinois state court, seeking to enjoin Miller from misappropriating its trade secrets. Two years later, when Angus was faced with a discovery order which would have required it to disclose the details of the technology, Angus voluntarily dismissed the lawsuit.

The defendants in that case then filed this suit. As plaintiffs here, they claim that but for the Illinois action they

would have sold AB for profit. They accuse Angus et al. of using anticompetitive means—the lawsuit—to thwart their plans.

As we said, the case was dismissed for lack of subject matter jurisdiction under FTAIA, which amends the Sherman Act, stating:

> This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of this Act other than this section.
>
> If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

What is relevant here is that the conduct must have "a direct, substantial, and reasonably foreseeable effect" on trade or commerce within the United States, rather than just on foreign commerce.

If the requirement for a substantial effect on commerce in the United States goes to the court's subject matter jurisdiction, the case is analyzed under Federal Rule of Civil Procedure 12(b)(1), which provides for dismissal of an action for lack of subject matter jurisdiction. Subject matter jurisdiction is, as we know, an issue that should be resolved

early but must be considered at any stage of the litigation. If subject matter jurisdiction is not evident on the face of the complaint, the motion to dismiss pursuant to Rule 12(b)(1) would be analyzed as any other motion to dismiss, by assuming for purposes of the motion that the allegations in the complaint are true. However, as here, if the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction, the movant may use affidavits and other material to support the motion. The burden of proof on a 12(b)(1) issue is on the party asserting jurisdiction. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884 (3d Cir.1977). And the court is free to weigh the evidence to determine whether jurisdiction has been established. *Capitol Leasing Co. v. FDIC*, 999 F.2d 188 (7th Cir.1993); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir.1998); *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3rd Cir.2000). Factual findings rendered during this process are reviewed for clear error. *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215 (7th Cir.1995); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir.2002).

On the other hand, if the requirement for a substantial effect on U.S. commerce is an element of the claim, then the motion would be properly treated under Rule 56 summary judgment standards. Summary judgment on the merits can be granted if, construing the facts against the moving party, there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. In short, at this stage of the litigation—that is, when the court is considering a motion—the analysis differs if the issue is one of jurisdiction or an issue on the merits. We think it is fair to say that in this case the procedure employed will dictate the result. The appellants have made little effort to demonstrate that the district court's findings of fact are clearly erroneous. They claim, however, that what we have here should be viewed as a motion for summary judgment on the merits. Under the summary judgment standard with the facts

construed in their favor, they contend that the defendants' motion should have been denied. The defendants, of course, contend that they should win under either standard, a proposition on which we need pass no judgment.

Over the years, the difficult issue of limiting the extraterritorial reach of the United States laws in international trade and international relations has received a good deal of attention. Despite the fact that, using language borrowed from the Foreign Commerce Clause of the Constitution, the Sherman Act itself prohibits agreements restraining "trade or commerce ... with foreign nations," there has long been concern about overreaching under our antitrust laws. As far back as *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), Justice Holmes said that the almost universal rule is that the "character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *American Banana*'s strict territorial test was moderated, if not rejected, in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir.1945). Judge Learned Hand was writing for the Court of Appeals for the Second Circuit, sitting pursuant to 15 U.S.C. § 29, which at the time authorized the designation of a court of appeals as a court of last resort for certain antitrust cases. The issue was whether Congress intended to impose liability for conduct outside the United States and whether the Constitution permitted it to do so. The court recognized that it should not read the words of Congress "without regard to the limitations customarily observed by nations upon the exercise of their powers." At 443. Creating what became known as the "effects test," the court concluded that the Sherman Act must be limited to acts which were "intended to affect [U.S.] imports and did affect them." Rejected was the notion that Congress intended "to punish all whom its courts can catch, for conduct which has no consequences within the United States." At 443. The Supreme Court

subsequently approved the effects test. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 53 L.Ed. 826 (1962).

Then FTAIA was enacted in 1982. There is some debate over the extent to which the Act simply codifies the "general understanding of when American antitrust law should be concerned about restraints abroad ...." *See* 1A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 272 (2d ed.2000). In *Hartford Fire Insurance v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993), the Court declined to decide whether FTAIA was a codification of prior law, but concluded that an agreement among foreign reinsurers and domestic insurers, under which the foreign reinsurers would refuse to cover certain American domestic insurance policies, met the effects test.

It is in *Hartford*, however, that Justice Scalia, in dissent, sets out the view that FTAIA does not go to subject matter jurisdiction at all. He perceived two distinct questions: whether the district court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged. His conclusion was that the district court had subject-matter jurisdiction, simply because the Sherman Act claim was not frivolous and 28 U.S.C. § 1331 gives the district court jurisdiction over cases "arising under" federal statutes. The second question, he said, "has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on regulatory power over the challenged conduct." At 813, 113 S.Ct. 2891. If the plaintiff were to fail to prevail on this question, the case would be dismissed not for lack of subject matter jurisdiction, but rather on the merits because the plaintiff had failed to state a cause of action. Justice Scalia explained that what is involved is "legislative jurisdiction" or "jurisdiction to prescribe," which refers to the authority of Congress to enact the law in the first place. The Sherman Act, tracking, as it does, the Commerce

Clause, is well within legislative jurisdiction. Nevertheless, principles of international comity dictate how a statute will be interpreted: "Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe." At 815, 113 S.Ct. 2891.

The majority in *Hartford* carries out the debate with Justice Scalia in footnotes. As to Justice Scalia's contention that what is involved in the case is prescriptive, as opposed to subject-matter jurisdiction, Justice Souter says that the parties "for good reason" do not question prescriptive jurisdiction. He then quotes commentators who say that the Sherman Act is a "prime example[e] of the simultaneous exercise of prescriptive jurisdiction and grant of subject matter jurisdiction." At 796 n. 22, 113 S.Ct. 2891. In explaining the role of comity, Justice Souter says that comity comes into play "if at all, only after a court has determined that the acts complained of are subject to *Sherman Act* jurisdiction." 509 U.S. at 797 n.24. Principles of international comity did not prevent the exercise of jurisdiction in that case.

One could argue that in *Hartford* it is not entirely clear what the phrase "Sherman Act jurisdiction" means. After all, "Jurisdiction is a word of many, too many, meanings." *United States v. Vanness*, 85 F.3d 661, 663, n. 2 (D.C.Cir.1996), *quoted in Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). But it seems reasonable to conclude, especially in light of the footnotes, that what the *Hartford* Court refers to is the court's subject-matter jurisdiction for Sherman Act claims.

That reading receives some support in domestic Sherman Act cases, which do not implicate FTAIA, but may shed some light by analogy. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441

(1980), was a private antitrust action, alleging that real estate brokers in New Orleans engaged in a price-fixing conspiracy. The issue before the Court was whether the Sherman Act extended to such a conspiracy. The procedural history shows that the district court had dismissed the case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The Court of Appeals for the Fifth Circuit said that the appropriate designation of the dismissal was for lack of subject-matter jurisdiction under Rule 12(b)(1) but, nevertheless, affirmed. The Supreme Court disagreed with the court of appeals on what is required for jurisdiction to exist but implicitly agreed that the case presented an issue of jurisdiction. The Court said:

> To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity.

At 242, 100 S.Ct. 502. The Court also said that despite "the breadth of *Sherman Act* prohibitions, jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified ...." At 242, 100 S.Ct. 502.

More recently, in *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991), the Court considered

> whether the interstate commerce requirement of antitrust *jurisdiction* is satisfied by allegations that petitioners conspired to exclude respondent, a duly licensed and practicing physician and surgeon, from the market for ophthalmological services in Los Angeles because he refused to follow an unnecessarily costly surgical procedure. [Emphasis added.]

The Court again had trouble agreeing on the precise answer to that question, as its 5-4 split shows, but said that the

conspiracy at issue "has a sufficient nexus with interstate commerce to support federal jurisdiction." At 333, 100 S.Ct. 502.

The Sherman Act and its FTAIA amendments are not the only statutes which present the dilemma regarding whether a statutory requirement is an element of a claim or a matter of subject-matter jurisdiction. In *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987), the Court determined that for subject-matter jurisdiction to exist under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, a plaintiff need only make a good-faith *allegation* of a continuous or intermittent violation of the Act. Justice Scalia dissented, this time not because all the subject-matter jurisdiction a court needs is provided under § 1331, but rather because "subject-matter jurisdiction can be called into question *either* by challenging the sufficiency of the allegation *or* by challenging the accuracy of the jurisdictional facts alleged." At 68, 108 S.Ct. 376 [emphasis in the original]. A little over 10 years later, in *Steel Company*, the Court considered the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. § 11046(a)(1). Justice Scalia, writing for the Court, and Justice Stevens, joined in part by Justices Souter and Ginsburg concurring in the judgment, debated, among other things, whether a provision of EPCRA was jurisdictional or an element of the claim. Looking to *Gwaltney*, Justice Stevens thought it was jurisdictional; Justice Scalia dismissed *Gwaltney* as a "drive by" jurisdictional ruling. In the Title VII context we have determined that the requirement that the definition of employer as "a person ... who has fifteen or more employees" was an element of the claim, not a matter of the subject matter jurisdiction of the court. The plaintiff had presented "a non-frivolous claim under federal law; no more is necessary for subject-matter jurisdiction." *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676,

677 (7th Cir.1998). The jurisdiction-versus-element-of-the-claim debate seems alive and well.

Turning back to FTAIA, we note that commentators tend to discuss FTAIA in terms of jurisdiction. *See, e.g.*, P. Areeda & H. Hovenkamp, ¶ 273; Herbert Hovenkamp, *Federal Antitrust Policy*, § 21.2 (2d ed.). Referring directly to subject-matter jurisdiction, the *ABA Section of Antitrust Law, Antitrust Law Developments* (5th ed.2002), at 1121, states that "to establish subject matter jurisdiction under the FTAIA, a plaintiff must also show that 'such effect'—i.e., the direct, substantial, and reasonably foreseeable anticompetitive domestic effect—'gives rise to' a Sherman Act claim." In addition, the Department of Justice and the Federal Trade Commission both consider the statute jurisdictional. Regarding jurisdiction over conduct involving foreign commerce, the guidelines for the agencies state "[T]he jurisdictional limits of the Sherman Act and the FTC Act are delineated in the FTAIA." *Antitrust, Unfairness, Deception Policies and Guidelines, reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13.107. The ABA explains that with "respect to subject matter jurisdiction, the *International Antitrust Guidelines* state that 'anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.'" Antitrust Law Developments, at 1120.

As we have said, this is our first foray into FTAIA. We have, however, considered the reach of the *Sherman Act* into foreign commerce prior to the enactment of FTAIA. In *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir.1980), we considered issues raised by the governments of Australia, Canada, South Africa, and Great Britain as to whether the district court could proceed in a case brought by Westinghouse Electric Corporation alleging antitrust violations against 26 foreign and domestic uranium

producers. For our purposes, we need not delve into the weighty issues of that case beyond noting that we said at 1253:

> We view the jurisdictional issue as two-pronged: (1) does subject matter jurisdiction exist; and (2) if so, should it be exercised?

However, we also determined in *United States v. Martin*, 147 F.3d 529 (7th Cir.1998), a criminal case involving the federal "bombing" statute, 18 U.S.C. § 844(i), that the requirement that the bombing have an effect on interstate commerce is not a matter of the court's jurisdiction over the crime or the defendant, but rather an element of the crime. Relying on *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), Martin wanted to set aside his guilty plea because, he said, it did not waive jurisdictional defenses, and the requirement for an effect on interstate commerce is jurisdictional. We rejected that claim, saying that although the requirement is often referred to as jurisdictional, it is "simply one of the essential elements of § 844(i)." It is, we said, simply a "shorthand sense that without that nexus, there can be no federal crime ...." At 532, 115 S.Ct. 1624. As we learned in *Lopez*, the nexus to the Commerce Clause is of considerable importance, as a matter of legislative jurisdiction, when Congress seeks to federalize street crimes—crimes which are otherwise the province of the states. In those instances, it seems to us, the requirement for interstate commerce is a hook on which the crime hangs. Once Congress has made the proper findings that, say, a certain crime implicates interstate commerce in some way, proof of the interstate commerce requirement has, at least traditionally, been rather perfunctory. Criminal statutes of this type are far less than compelling analogies to FTAIA.

We see the purity of an argument that 28 U.S.C. § 1331 provides federal question jurisdiction for cases "arising

under the Constitution, laws, or treaties of the United States" so that without more, the federal courts have jurisdiction over Sherman Act claims. It would follow, then, that any requirement for an effect on interstate commerce must be an element of the claim. We know, however, that nothing is quite that simple. For instance, a frivolous suit which charges a violation of a federal statute "arises under" federal law. Yet, because the suit is frivolous, subject matter jurisdiction over it is lacking. *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946) ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."). *See also Crowley Cutlery Co. v. United States*, 849 F.2d 273 (7th Cir.1988). On the other hand, it is also true that sometimes a reference to "jurisdiction" in statutes is merely, as we said in *Martin*, a shorthand way of referring to an element of the claim. Such references are a way of referring to that part of a statute which sets out the basis for legislative jurisdiction.

But with reference to FTAIA, the argument that the statute sets out an element of the claim or a basis for legislative jurisdiction has not gained approval. Even after the decision in *Steel Company*, the EPCRA case decided in 1998, courts of appeals continue to treat FTAIA as jurisdictional. Whatever their differences in interpretation of the Act or the effect it has on prior judge-made law, all have treated the issue as one of subject matter jurisdiction. *See Kruman* (review of the district court's dismissal for lack of subject matter jurisdiction under FTAIA); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir.2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127, 122 S.Ct. 1059, 151 L.Ed.2d 967 (2002) (finding that the district court properly dismissed antitrust claim for lack of subject matter jurisdiction under FTAIA);

Carpet Group (finding that FTAIA did not divest the court of subject matter jurisdiction on the claims presented); *Filetech S.A.* (finding that the district court should have looked to the factual matters presented to it regarding whether subject matter jurisdiction existed under FTAIA); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless, PLC*, 148 F.3d 1080 (D.C.Cir.1998) (stating that a court has subject matter jurisdiction only to the extent that the complaint alleges that the challenged conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce under FTAIA). The latter court has revisited the issue recently to define the "jurisdictional reach of the federal antitrust laws." *Empagran S.A. v. F. Hoffman-Larouche, Ltd.*, 315 F.3d 338 (D.C.Cir.2003). The argument was whether *Den Norske* or *Kruman* set out the proper view of FTAIA's jurisdictional reach. The court rejected both approaches, saying that its view of the statute falls "somewhere between the views of the Fifth and Second Circuits ...." Holding that where the "anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce," the court found that "subject matter jurisdiction is proper" in the case before it. We simply cannot dismiss these cases as "drive-by" jurisdictional rulings.

In *Hartford*, as well, it is not likely that references to jurisdiction are really references to legislative, rather than subject-matter, jurisdiction. Justice Souter made it clear that he disagreed with Justice Scalia's contention that under FTAIA what is at issue is legislative jurisdiction. To reiterate, he said:

> JUSTICE SCALIA believes that what is at issue in this litigation is prescriptive, as opposed to subject-matter, jurisdiction .... The parties do not question prescriptive jurisdiction, however, and for good

> reason: it is well established that Congress has exercised such jurisdiction under the Sherman Act. See G. Born & D. Westin, International Civil Litigation in United States Courts 542, n. 5 (2d ed. 1992) (Sherman Act is a "prime example[e] of the simultaneous exercise of prescriptive jurisdiction and grant of subject matter jurisdiction").

So, while it might seem desirable to have no messy extra jurisdictional requirements under some acts of Congress, but not others, that is not how our system necessarily works. There is no question that Congress has the power to limit the jurisdiction of the federal courts. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 58 S.Ct. 578, 82 L.Ed. 872 (1938). Every federal court, other than the Supreme Court, derives its jurisdiction from Congress, which, within constitutional bounds, may withhold or restrict jurisdiction. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L. Ed. 226 (1922). The Court has visited the "jurisdiction stripping" issue recently in the context of the Telecommunications Act of 1996, in which it considered whether federal courts have jurisdiction over a carrier's claim that an order of a state utility commission violated federal law. The Court declined to consider whether 47 U.S.C. § 251(c) conferred jurisdiction, it "at least does not divest the district courts of their authority under 28 U.S.C. § 1331 ...." *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 122 S.Ct. 1753, 1758, 152 L.Ed.2d 871 (2002). What is left unspoken is that Congress could divest the courts of jurisdiction if it chose to.

As we have said, the legislative history shows that jurisdiction stripping is what Congress had in mind in enacting FTAIA. The statute was enacted against a backdrop of almost 60 years of precedent which characterized the application of the Sherman Act to the conduct of foreign markets as a matter of subject matter jurisdiction. We must presume that Congress expects

statutes to be read to conform with Supreme Court precedent. *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). Also as we have said, the courts of appeals had applied the pre-FTAIA effects test as a limit on subject matter jurisdiction.[1] Nothing in FTAIA hints that Congress intended to dramatically change this approach. In fact, the legislative history indicates otherwise. The House Report says that satisfying FTAIA would be "the predicate for antitrust jurisdiction." It also says, "[t]his bill only establishes the standards necessary for assertion of United States Antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiffs' claim would remain unchanged." H.R.Rep. No. 97-686 at 11 (1982), U.S. Code Cong. & Admin. News at 2487, 2496. Perhaps that is why after FTAIA courts have continued to treat the issue as one of subject matter jurisdiction.

There are good policy reasons for the prevailing approach. The extraterritorial scope of our antitrust laws touches our relations with foreign governments, and so, it seems, it is prudent to tread softly in this area. If FTAIA sets out an issue on the merits, resolution of the issue could be delayed until late in the case, and the potential for a lawsuit to have an effect on foreign markets would exist while the case remained pending. In contrast, if this important issue goes to subject matter jurisdiction, it can be resolved early in the litigation. If missed early on, it can be

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[1] The dissent suggests, incorrectly we think, that our decision will move government prosecutors to avoid the Seventh Circuit when investigating criminal violations of the Sherman Act. We don't think so. But we add that if the dissent is correct, the government will not only have to avoid the Seventh Circuit, but also all the other circuits that say, as we do here, that the requirement of an effect on U.S. commerce relates to subject matter jurisdiction. Finally, we fail to see the harm to Sherman Act criminal prosecutions that concerns the dissent. If the government can't prove to a judge a minimum requirement that activity alleged to be in violation of U.S. criminal law had an effect on U.S. commerce, it shouldn't be bringing a Sherman Act case in the first place.

resolved whenever it becomes clear that the alleged anticompetitive activity does not have a substantial effect on United States commerce. If the parties do not raise the issue, a judge has an obligation to raise it. Treating the matter as one of subject matter jurisdiction reduces the potential for offending the economic policies of other nations. In short, FTAIA limits the power of the United States courts (and private plaintiffs) from nosing about where they do not belong. And the power of the courts is precisely what subject matter jurisdiction is about. For all of these reasons, we find that the district court properly treated the issue as one of subject matter jurisdiction.

That being the case, we must determine whether the court's findings of fact are clearly erroneous. In its analysis, the court examined thousands of pages of evidentiary materials which formed the basis for its findings of fact. The court found that there was virtually no evidence that the plaintiffs would have made any sales in the United States. They set out to produce a tuberculosis drug for India. Experts say that the main application for AB is to produce Ethambutol, which is primarily used in India. The Lederle division of American Home Products was at the relevant time the only company in the world that had FDA approval to sell Ethambutol in the United States. Lederle imported Ethambutol into the United States from Italy using a product that it buys in India. In fact, it appears that the very small amount of AB sold in the United States was used as an ingredient in a product for making rocket motors, not drugs. 3M used a very small amount for this purpose, purchasing less than 0.4 percent of the world's AB production—or $25,000 in total volume. But 3M never conducted formal bidding for this small purchase and shows no signs of changing its supplier.

Other than saying that "there is ample evidence to support plaintiffs' allegations," plaintiffs do not tell us how

the court's findings are clearly erroneous. True, the plaintiffs outline the evidence reflecting their plans to manufacture the products for sale in the United States. And, in fact, it may be that there was evidence to support that position. But the district court is allowed on this motion to weigh the facts, and when it did, it found that plaintiffs

> had no actual plans to sell AB in this country and that there would have been no significant AB sales opportunities for Plaintiffs in this country even if they had tried to sell AB here. For instance, Miller testified that he "had no conversation with any potential customers for AB in the United States." Miller Dep. 413. Moreover, Shroff testified that he and his "marketing man" spoke with ten to twelve potential AB customers, all of which were located in India. Shroff Dep. 144-45, 161-62.

At 1012. Plaintiffs' own liability expert testified that AB sales in the United States would be "less than substantial." Similar findings were made regarding the other chemicals involved. The plaintiffs do not point out how these findings were clearly erroneous, and our review leads us to conclude that they were not. With the dismissal of the federal claims, the dismissal of pendent state-law claims was also proper. Accordingly, the judgment of the district court is AFFIRMED.

DISSENT:

DIANE P. WOOD, Circuit Judge, dissenting, with whom Circuit Judges EASTERBROOK, MANION, and ILANA DIAMOND ROVNER join.

In straightforward language, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a, says that the Sherman Act "shall not apply" to conduct involving foreign trade or commerce unless that conduct has

a "direct, substantial and reasonably foreseeable effect" on either U.S. domestic commerce, U.S. import commerce, or (for U.S. exporters only) on U.S. export commerce. The question before us today, which not only reaches this court as an issue of first impression, but which has also never been analyzed thoroughly by any other court, is whether these criteria for the statute's "applicability" strip federal district courts of their acknowledged subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 over cases that do not meet the test, or if instead they describe an element of the plaintiff's claim. The majority has opted for the former approach, largely because the word "jurisdiction" appears in many prior decisions of lower courts and in certain materials published by the government's antitrust enforcement agencies and the American Bar Association. But neither the majority nor those earlier opinions have distinguished carefully between judicial and legislative jurisdiction—or, to put it differently, between jurisdiction to decide a case and jurisdiction to prescribe a rule of law. The central question now before us is whether the FTAIA affects the former or the latter power. Given the fact that "jurisdiction is a word of many, too many, meanings," *ante* at 947-48, quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C.Cir.1996), which was quoted in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), it is plain that the analysis cannot stop with the observation that the FTAIA somehow affects "jurisdiction."

In my view, there are at least four compelling reasons why we should not construe the FTAIA's test as one going to the subject matter jurisdiction of the court, and instead should adopt what I will call an "element" approach: first, the language of the statute supports the position that this is an element of the claim, especially when it is contrasted to true jurisdiction-stripping statutes; second, the "subject matter jurisdiction" characterization is inconsistent with the

Supreme Court's decision in *Steel Co.* and with the law of this court; third, the procedural consequences of a "subject matter jurisdiction" reading would have perverse effects, measured against the policies the FTAIA and the federal antitrust laws were designed to further; and finally, to call this "subject matter jurisdiction" fails to take into account the long history of the application of the U.S. antitrust laws to foreign conduct.

I

Although the majority has set forth the relevant language of the FTAIA, it bears repeating here, both for ease of reference and for emphasis. It reads as follows (and there is equivalent language covering section 5 of the Federal Trade Commission Act):

> Sections 1 to 7 of this title [Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial and reasonably foreseeable effect—
>
> A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> B) on export trade or export commerce with foreign nations, of a person engaged in such trade or in commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a.

One will search in vain in this brief passage for any hint that the Congress was attempting to strip federal courts of their competence to hear and decide antitrust cases with a

foreign element. In my view, that alone should be enough to tip the balance toward the "element" characterization. To begin with, while one can find examples in Supreme Court decisions of the Court's treatment of statutes with jurisdictional language as non-jurisdictional (*e.g.*, *Steel Co.*, discussed below; *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950-51, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (False Claims Act)), there are no examples of the opposite approach—treating something as jurisdictional that is phrased in terms of the scope of application of a statute. Secondly, this court has recognized that jurisdiction-stripping rules must be expressed clearly. In *Czerkies v. U.S. Department of Labor*, 73 F.3d 1435 (7th Cir.1996) (*en banc*), we held that the door-closing statute prohibiting judicial review of certain federal workers' compensation claims should not be construed to bar review of constitutional claims in the absence of express language to that effect. *Id.* at 1439. The same approach is appropriate for other kinds of jurisdiction-stripping statutes. Naturally, when Congress does speak clearly, as it did in the statute that bars judicial review of certain immigration decisions, see 8 U.S.C. §§ 1252(a)(2)(B) and 1255, the courts do and should recognize that their competence to act has been withdrawn. See *McBrearty v. Perryman*, 212 F.3d 985 (7th Cir.2000) (dismissing suit attempting to avoid § 1252(a)(2)(B), which provides that "notwithstanding any other provision of law, no court shall have jurisdiction to review ... any judgment regarding the granting of relief under" section 1255). Language like that of the FTAIA, stating that a law does not "apply" in certain circumstances, cannot be equated to language stating that the courts do not have fundamental competence to consider defined categories of cases.

II

The fact that the FTAIA does not contain a clear congressional statement that it is intended to restrict the

subject matter jurisdiction of the federal courts (or for that matter even a brief mention of the term "jurisdiction") should be enough to resolve the question before us. If more is needed, then we must consider further how to determine whether a particular law affects the competence of a federal court to entertain the case at all, or if it simply outlines the scope of the statute and permits the court to issue a decision on the merits either upholding or rejecting a claim. Our starting point should be the Supreme Court's decision in *Steel Co., supra*, 523 U.S. 83, 188 S.Ct. 1003, 140 L.Ed.2d 210. In *Steel Co.*, the Supreme Court held that the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. § 11046(a)(1), which permitted a private action only if certain prerequisites were satisfied, did not affect the district court's subject matter jurisdiction. 523 U.S. at 89-90, 118 S.Ct. 1003. Although the EPCRA actually used the word "jurisdiction" to describe the permitted actions, the Court did not find that fact dispositive. Instead, it reaffirmed the long-standing rule that power to adjudicate a case does not depend on whether in the final analysis the plaintiff has a valid claim. "[T]he district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 89, 118 S.Ct. 1003 (internal quotations omitted). In the present case, the plaintiffs will have a right to recover if defendants' activities have the requisite effect on either U.S. domestic or import commerce (and they can prove the remainder of their federal antitrust claim), and they will lose if those effects are lacking.

It is worth noting that the extraterritorial reach of statutes varies widely. Some statutes, such as Title VII of the Civil Rights Act of 1964, have been interpreted by the Supreme Court as having no application at all beyond U.S. borders, even if both the employer and the employee are

U.S. citizens. See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). Other statutes, such as 18 U.S.C. § 2333, are virtually unlimited in their territorial reach. Section 2333 provides a private right of action for civil damages for any national of the United States injured "by reason of an act of international terrorism" (or the victim's estate) to sue those responsible for the act in a U.S. court for treble damages, no matter where in the world the act occurred, and no matter what the nationality of the perpetrator was. See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir.2002). Still other statutes are like the FTAIA: they define a subset of actions and actors outside the United States whose actions fall within the scope of U.S. law. It is up to Congress to decide how broad or narrow a law it is enacting, and what the plaintiff must prove to be entitled to relief.

That is what Congress did in the FTAIA: it established the "direct, substantial, and reasonably foreseeable" effect on commerce test as an element of the plaintiff's claim. It did not disempower the federal courts from ruling on the merits for a defendant when the plaintiff is unable to make the requisite showing. The majority's suggestion that the Supreme Court held otherwise in *Hartford Fire Ins. v. California*, 509 U.S. 764, 812, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) is inaccurate. In fact, the *Hartford Fire* majority thought it unnecessary to address the FTAIA's effect on the case at all, see *id.* at 797 n. 23, 113 S.Ct. 2891, and thus it had no need to engage the dissenters on the "element" versus "jurisdiction" point. It is true that Justice Scalia, writing for the four dissenters, observed that "[a] cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." *Id.* at 812, 113 S.Ct. 2891. Even though this isolated statement was in a dissent and thus not authoritative at the time it was made, the more important point is that the legal principle it reflected was later adopted by a majority of the

Court first in *Steel Co.*, and then later in *United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) ("[*Ex parte*] *Bain*'s [121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)] elastic concept of jurisdiction is not what the term "jurisdiction" means today, *i.e.*, "the courts' statutory or constitutional *power* to adjudicate the case."") (Emphasis in original, quoting from *Steel Co.*). The approach I am advocating is entirely consistent, therefore, with current Supreme Court doctrine.

This court has had occasion to consider the question whether effect-on-commerce elements analogous to those in the FTAIA affect subject matter jurisdiction or the statement of a claim, and we have concluded that they do not. See *United States v. Martin*, 147 F.3d 529 (7th Cir.1998), cited with approval in *United States v. Rayborn*, 312 F.3d 229, 231 (6th Cir.2002); *United States v. Carr*, 271 F.3d 172, 178 (4th Cir.2001); *United States v. Prentiss*, 256 F.3d 971, 982 (10th Cir.2001); *United States v. Beck*, 250 F.3d 1163, 1165 (8th Cir.2001); *Alikhani v. United States*, 200 F.3d 732, 734-35 (11th Cir.2000). While the statute at issue in *Martin* was a criminal law, 18 U.S.C. § 844(i), I agree with the First Circuit that there is no jurisdictional distinction in the Sherman Act between the civil and criminal reach of the statute. See *United States v. Nippon Paper Indus.*, 109 F.3d 1 (1st Cir.1997). (Indeed, I do not understand the majority to be taking issue with this aspect of the *Nippon Paper* holding.) The fact that the present case is civil, and *Martin* was criminal, therefore provides no reason not to follow *Martin*'s jurisdictional characterization. Nor do I see any other principled distinction that can be drawn between our analysis in *Martin* and the problem now before us.

III

Yet another reason why the majority's rule is ill-advised comes from the nature of jurisdictional rules and the consequences of treating something as affecting the subject

matter jurisdiction of the court. Rules about subject matter jurisdiction define the allocation of business between the federal and the state courts. The federal courts are courts of limited jurisdiction. Only if Article III of the Constitution confers power on them to hear the particular kind of case or controversy at issue, and if a statute of Congress has implemented that constitutional grant of power, can a case be heard in federal court.

The first point here is that a recognized issue of subject matter jurisdiction must be resolved before any other action is taken on the case. There is an important institutional interest in resolving jurisdictional questions quickly and simply. Congress recognized this in one of its classic jurisdiction-stripping rules: federal appellate courts have no jurisdiction to review district court decisions remanding cases to state court when the district court relies on a reason outlined in 28 U.S.C. § 1447(c). See 28 U.S.C. § 1447(d). Inquiries into whether a case "arises under" federal law, for purposes of § 1331 jurisdiction, can normally be completed by a review of the complaint. Inquiries into diversity jurisdiction are often just as straightforward, even though fact-finding might be necessary in the occasional case in which it is unclear where a person is domiciled, or what amount is in controversy, or which of several corporate facilities should count as the corporation's principal place of business.

The jurisdictional inquiries just described are well-defined and do not normally consume enormous judicial resources. In contrast, an inquiry into whether a particular course of conduct has a "direct, substantial, and reasonably foreseeable effect" on either the domestic commerce of the United States or its import commerce threatens to become a preliminary trial on the merits. Indeed, the record in one famous international antitrust case, *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, should give advocates of

the "subject matter jurisdiction" approach serious pause. That case was originally filed in the district court in 1973. In 1974, the district court dismissed for want of "subject matter jurisdiction." The Ninth Circuit reversed in 1976. See 549 F.2d 597 (9th Cir.1976). Six years of discovery then took place, in which the parties explored the effects of the alleged conspiracy on U.S. commerce. In 1983, the district court again dismissed the action for want of jurisdiction. See 574 F.Supp. 1453 (N.D.Cal.1983). Up on appeal again to the Ninth Circuit, the case was affirmed, though on somewhat different grounds. 749 F.2d 1378 (9th Cir.1984). In 1985, the Supreme Court denied certiorari, see 472 U.S. 1032, 105 S. Ct. 3514, 87 L.Ed.2d 643 (1985), with a note indicating that Justices White and Blackmun would have granted review. Thus, at least 12 years after the case was filed, the "jurisdictional" issue was finally resolved. Had it been resolved in the affirmative, there is no telling how many more years would have passed before the litigation was over. This is no way to decide whether the federal courts are competent to hear a case.

The element approach, in contrast, has none of those defects. In some instances, it will be possible to resolve the FTAIA issue on the pleadings or on summary judgment, and appellate review from either kind of decision *de novo*. If the issue is not capable of resolution on summary judgment, that should be a red flag in any event. Effect on commerce issues will often be closely intertwined with the merits. Yet if the case reaches the merits, there is no reason why the court cannot resolve the most straightforward issue first. Many antitrust cases founder on the issue of market power, especially when world markets are at issue. But *Steel Co.* made it abundantly clear that courts are not entitled simply to assume jurisdiction and resolve an easy merits issue, if true subject matter jurisdiction is at stake.

If something affects the subject matter jurisdiction of the court, there are a number of other consequences which would be undesirable for the FTAIA. First, there is necessarily never a time when the question cannot be raised. As the Supreme Court has repeatedly emphasized, the fundamental competence of the court to act can be challenged at any time, up to and including at the Supreme Court level. See, e.g., *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884); 20 Charles Alan Wright & Mary Kay Kane, Federal Courts § 7 at 28 (5th ed.1994). This would offer an irresistible invitation to the losing party in an international antitrust case to invite the Supreme Court to revisit the complex question whether there are direct, substantial, and reasonably foreseeable effects on U.S. commerce, whether or not that objection was preserved before the district court or the court of appeals. Indeed, the court will be required to raise the issue on its own, even if the parties have been content to stipulate to dollar amounts of commerce, destinations of goods, business plans tending to show foreseeability, and other pertinent facts. In many cases, the parties may be willing to stipulate that the necessary effects on U.S. commerce are present, so that they can get down to the business of resolving their dispute. All that is impossible if we are dealing with subject matter jurisdiction.

Second, characterization affects removal. Recall that the subject matter rules indicate whether the case falls within the limited jurisdiction of the federal courts. If it does not, then it presumptively can be heard by a state court of general jurisdiction. Although the federal antitrust laws are commonly held to fall within the exclusive jurisdiction of the federal courts, nothing requires Congress to keep things that way. If Congress indeed meant to strip the federal courts of subject matter jurisdiction over foreign commerce antitrust cases, then those cases revert to state courts. No one has suggested that we can also divine from the language of the

FTAIA a congressional intent to deny any U.S. forum whatsoever for foreign commerce cases. (Indeed, serious constitutional questions would arise if we were to read the statute as purporting to define the jurisdiction of the state courts, given the degree of sovereignty the states retain under the federal Constitution.) Thus, state courts can and will hear foreign commerce antitrust cases where "direct, substantial, and reasonably foreseeable" effects are missing. Some of those state courts might dismiss on *forum non conveniens* grounds; some might apply their own test for whether a claim is stated and dismiss on the merits; some might keep the case and adjudicate it, creating far greater friction with foreign sovereigns than would result from exclusive federal jurisdiction and an elements-based test. Naturally, if this kind of case is filed in state court, it cannot be removed to federal court, because suits may be removed only if they could have been filed originally in a federal court. See 28 U.S.C. § 1441; *Syngenta Crop Protection, Inc. v. Henson*, __ U.S. __, 123 S.Ct. 366, 369-70, 154 L.Ed.2d 368 (2002). Furthermore, even if such a case is physically removed and is lodged in the federal court on an untenable claim of federal jurisdiction, the federal court (after potentially lengthy inquiries into the FTAIA test) will be required to remand it for lack of jurisdiction. See 28 U.S.C. § 1447(c). Such a decision is not a decision on the merits, and it will thus not block further proceedings in the state court.

There are also consequences for appellate review if this is a jurisdictional issue. As already noted, district courts resolve whatever jurisdictional facts are contested in advance of the trial. Appellate review of those fact-findings is deferential. Although the defendants argued that the policies behind the FTAIA—particularly the avoidance of diplomatic tensions with other countries—are better served by the jurisdictional characterization, that assumes that district courts will systematically reject jurisdiction. There is no reason at all to make such an assumption. If district

courts find the FTAIA test satisfied, foreign parties will be stuck with deferential appellate review of those facts. This also means that appellate courts will not be free to give plenary consideration to the sensitive issues of international comity that can arise in these cases—issues better resolved at the level of the court of appeals or the Supreme Court than by a solitary district judge. For all these reasons as well, it is preferable to treat the FTAIA as establishing an element of the claim.

The subject matter jurisdiction characterization makes no sense, either from the point of view of the policies being furthered by the FTAIA, or from the standpoint of judicial administration. We should not adopt a perverse decision just because parties have chosen to file motions under Rule 12(b)(1) instead of Rule 12(b)(6) or Rule 56, or because courts have unquestioningly adopted the diction of "subject matter jurisdiction" without careful examination.

IV

Finally, if all the rest of these reasons were not enough to compel an "element" reading, a review of the history of the application of the antitrust laws to persons and conduct beyond the borders of the United States also leads to that result. As the majority notes, the first time the Supreme Court had occasion to consider the question whether the Sherman Act applied to activities outside the United States occurred less than 20 years after the passage of the Act, in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). There, writing for the Court, Justice Holmes rejected the plaintiff's argument that the Sherman Act penalized an elaborate arrangement by the defendant that affected banana imports into the United States. At the center of the case was a dispute between Panama and Costa Rica over which country had sovereign authority over a particular banana plantation; plaintiff claimed that the defendant had instigated the border war for

purposes of controlling the banana trade. Using language that proved to be far broader than later courts were willing to accept, Justice Holmes wrote that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Id.* at 356, 29 S.Ct. 511. Moreover, he wrote, "in case of doubt, [one would be led to] ... a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *Id.* at 357, 29 S.Ct. 511. Nothing in this language suggests that the Court thought it was addressing federal court subject matter jurisdiction in the sense of the competence of a court with limited powers to resolve the dispute. This was a topic with which the Justices were certainly familiar, having dismissed an action only one year earlier themselves for failure to satisfy the well-pleaded complaint rule, despite the fact that no one had noticed the problem before the case reached the high court. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Instead, it was talking about how broad a statute Congress had enacted, and how much conduct Congress was trying to regulate. It was the legislative branch, in short, which the Court thought had not reached out to cover an intergovernmental dispute affecting international trade in bananas. There was not a hint that the federal courts had no competence to decide that the Sherman Act did not reach that far.

Between the time *American Banana* was decided and the time when the Second Circuit rendered its *Alcoa* decision, the Court handed down at least two decisions that qualified the strict territorial view of the former case. See *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1927). Both cases also talk in terms of the coverage of the antitrust

statutes with respect to the foreign activities and actors. *American Tobacco* upheld the application of the statute to two English corporations, see 221 U.S. at 172, 184-85, 31 S.Ct. 632, and *Sisal Sales* upheld the application of the laws to a Mexican-based conspiracy to control the importation of sisal from Mexico into the United States and its subsequent sale.

The next major decision addressing the extent to which the U.S. antitrust laws reach foreign parties and conduct was *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir.1945) [hereinafter *Alcoa*]. In that case, the court had to decide whether certain foreign parties, who had acted wholly outside the United States, had nonetheless violated the Sherman Act. As the court put it, "[d]id either [agreement] violate § 1 of the Act? ... [W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability ...." 148 F.2d at 443. Turning to the field of "conflict of laws" for guidance, the court concluded that "the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them." *Id.* at 444. In time, this became known as the "intended effects" test, which in various forms governed until the FTAIA was passed, and arguably still applies in import cases. See *Hartford Fire*, 509 U.S. at 796, 113 S.Ct. 2891 ("it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States") and at 797 n. 23, 113 S.Ct. 2891 (indicating that it was not necessary to address the question whether the FTAIA affected the case).

The *Alcoa* decision was not warmly received in other countries, which as of the mid-1940s did not as a rule have

antitrust laws and which resented the apparent effort of the United States to act as the world's competition police officer.[1] See generally Spencer Weber Waller, Antitrust and American Business Abroad, vol. I, ch. 4. This led to an outpouring of scholarly writing on the general question of the way prescriptive jurisdictional lines should be drawn among nations from the perspective of public international law. The fruits of this effort appear today in the American Law Institute's influential Restatement (Third) of the Foreign Relations Law of the United States ("Restatement Third"), Part IV (1987), which addresses the subject of jurisdiction and judgments. The Restatement Third identifies three types of jurisdictional limitations recognized by international law: those on jurisdiction to prescribe ("*i.e.* to make [the state's] law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court"), those on jurisdiction to adjudicate, and those on jurisdiction to enforce. Restatement Third, § 401. Section 415 of the Restatement Third is devoted specifically to jurisdiction to regulate anti-competitive activities.

The commentary to section 401 addresses exactly the problem now before us: that is, what is the relation between the various heads of jurisdiction identified in the Restatement and the domestic U.S. concept of "subject matter jurisdiction." Comment c reads as follows:

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[1] Today, over 90 countries have competition laws. See, *e.g.*, Diane P. Wood, "International Harmonization of Antitrust Law: The Tortoise or the Hare?" 3 Chicago J. Int'l L. 391, 392 n. 6 (2002). Interestingly, the number of disputes over so-called extraterritorial applications of national laws, whether by the United States, the European Union, or others, has dropped dramatically. Discussions today tend to focus on better ways of coordinating these many national-level regimes, and antitrust authorities around the world are eager to cooperate with one another within the confines established by national confidentiality laws.

> "Subject matter jurisdiction," in common usage in other contexts, is not used in this Restatement. This term sometimes refers to the constitutional authority of a governmental body, for example the authority of Congress under the United States Constitution to legislate on a subject (principally under Article I, Section 8), or the authority of a State of the United States to legislate within constitutional limitations on State authority (Article I, Section 10). The term is also often used in judicial decisions to describe other limitations on governmental authority, including those involving the reach of United States law, addressed in this Restatement as jurisdiction to prescribe. Jurisdiction to prescribe with respect to transnational activity depends not on a particular link, such as minimum contacts ("use of the mails," or "crossing state lines"), which have been used to define "subject matter jurisdiction" for constitutional purposes, but on a concept of reasonableness based on a number of factors to be considered and evaluated. §§ 402-403.

Thus, the domestic concept of subject matter jurisdiction has no bearing on the question whether the United States validly prescribed a certain rule of law. Section 415 offers detailed guidance on the scope of prescriptive jurisdiction in cases dealing with anticompetitive activities.[2]

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[2] The text and commentary of section 415 is also informative:

§ 415. Jurisdiction To Regulate Anti-Competitive Activities

(1) Any agreement in restraint of United States trade that is made in the United States, and any conduct or agreement in restraint of such trade that is carried out in significant measure in the United States, are subject to the jurisdiction to prescribe of the United States, regardless of the nationality or place of business of the parties to the agreement or of the participants in the conduct.

(2) Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in

It is this topic of prescriptive jurisdiction, and how far the U.S. antitrust laws were actually reaching, that was before Congress when it enacted the FTAIA. (While it is true that the House Report on the FTAIA uses the word "jurisdiction" with some regularity, it also speaks repeatedly about whether U.S. antitrust law should be applied to particular transactions. See H.R.Rep. No. 97-686, 97th Cong., 2d Sess. (1982), U.S. Code Cong. & Admin. News at 2487. It is therefore impossible to draw any firm conclusions from that brief document that will assist us in resolving the issue presently before us.) Congress was trying simultaneously to assure U.S. companies that they would not be subject to potentially stricter U.S. antitrust laws when they were conducting business wholly in foreign markets, and to assure foreign countries and their citizens that they would not be swept into a U.S. court to answer under U.S. law for actions that were of no legitimate concern to the United States. Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 Sum-Antitrust 53, 53-58 (2001). This much is fairly clear. What has not been clear

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restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

(3) Other agreements or conduct in restraint of United States trade are subject to the jurisdiction to prescribe of the United States if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.

Comment b to this section quotes the FTAIA in full, and goes on to say that "Congress apparently believed that activity whose anti-competitive effects are felt only in foreign states should not be a concern of United States antitrust regulation, but that activities carried out abroad that have 'direct, substantial, and reasonably foreseeable' effect in the United States or on the import trade of the United States (as by limiting imports or fixing the price of imported products) should be subject to the Sherman and FTC Acts."

has been the way in which the FTAIA itself has been handled in the federal courts.

At one level, virtually everyone concedes that federal subject matter jurisdiction exists in cases like United Phosphorus's. The claim certainly arises under a federal law—the Sherman Act—and thus falls within the scope of 28 U.S.C. § 1331 and 28 U.S.C. § 1337. Furthermore, typically no one claims that the claim presented is so frivolous that jurisdiction fails under the principle acknowledged in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). Nevertheless, as the majority has accurately noted, defendants who believe that their activities were too "foreign" to be swept under the U.S. antitrust laws have usually attacked the plaintiff's case with a motion under FED. R. CIV. P. 12(b)(1), which covers "lack of jurisdiction over the subject matter," and sometimes in the alternative with a motion under Rule 12(b)(6), which covers "failure to state a claim upon which relief can be granted."

Although several courts of appeals have decided dismissal motions based on the FTAIA under the rubric of "subject matter jurisdiction," see, *e.g.*, *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C.Cir.,2003); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir.2002); *Den Norske Stats Oljeselskap AS v. HeereMac Vof*, 241 F.3d 420 (5th Cir.2001), *cert. denied*, 534 U.S. 1127, 122 S.Ct. 1059, 151 L.Ed.2d 967 (U.S. Feb. 19, 2002) (00-1842); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C.Cir. 1998), most have focused on the merits of the FTAIA analysis rather than the precise procedural manner in which it was presented. None of them has given the sustained attention to the "jurisdiction vs. element" inquiry that this court has now done.

Indeed, in the most recent of these decisions, *Empagran*, the court was singularly unconcerned with the distinction between these two approaches. It certainly speaks of a lack

of "subject matter jurisdiction" under the federal antitrust laws, 315 F.3d 338 at 340041, and the issue reached the court on a motion made under FED. R. CIV. P. 12(b)(1), but both the test the court adopted and its analysis are telling for our purposes. The test it chose to use for FTAIA cases was as follows:

> We hold that where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive effect itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court.

Id. at 341. In other words, if one is to take the "subject matter jurisdiction" characterization seriously, the court is competent to decide the case only if it concludes (tentatively? conclusively?) that the statute has been violated and someone has standing to sue. With all due respect to my colleagues in the D.C. Circuit, I find such an approach to subject matter to be inconsistent with the Supreme Court's decisions in cases like *Steel Co.* and *Bell v. Hood.* (For the record, I am not necessarily expressing any disagreement with the ultimate result in *Empagran*; my concern is only with this implicit part of the court's rationale.)

Even more troublesome is the court's analysis of subject matter jurisdiction. It begins with the observation that its review is *de novo.* 315 F.3d at 343-44, This, of course, would be true if the dismissal were under Rule 12(b)(6) or Rule 56. If it is really under Rule 12(b)(1) and the district court has made findings of fact, then it is not accurate; the legal conclusion would be reviewed *de novo*, but the facts would be reviewed deferentially. In any event, the court continues with the following passage:

> A complaint may be dismissed for lack of subject matter jurisdiction only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C.Cir.1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)). In our review, this court assumes the truth of the allegations made and construes them favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

315 F.3d 338 at 343. The problem with this passage is that almost all of it describes not the rule that applies to motions to dismiss for lack of subject matter jurisdiction, but instead motions to dismiss for failure to state a claim. In *Sinclair*, for example, the district court had dismissed the claim under Rule 12(b)(6), and the passage to which the *Empagran* court referred correctly quotes the governing standard from *Conley*. But the passage in *Conley* has nothing to do with subject matter jurisdiction dismissals. It says instead that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46, 78 S.Ct. 99. While *Scheuer* states that "in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a claim, the allegations of the complaint should be construed favorably to the pleader," 416 U.S. at 236, 94 S.Ct. 1683, it made this comment in the context of its review of a dismissal based on the Eleventh Amendment, on its way to remanding the case to the lower courts for further fact-finding. It in no way purported to change the rule that when subject matter jurisdiction is contested, the district court itself must hold a hearing to resolve the jurisdictional facts, and that the ultimate decision is for the court, not for a jury. See generally 5A Charles

Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1350 at 234-35 (2d ed.1990). Thus, to the extent that others should follow what the *Empagran* court did, rather than what it said in passing, one should take this as a case acknowledging that a dismissal for failure to meet the standards of the FTAIA is one for failure to state a claim.

The Second Circuit's *Kruman* decision also spoke in terms of a "subject matter jurisdiction" dismissal, see 284 F.3d at 390, and it correctly noted that the district court could "resolve disputed jurisdictional issues of fact through reference to evidence outside of the pleadings." *Id.* Nevertheless, as in *Empagran*, the court paid no attention to the issue now before us; it was concerned instead about the type of effect on domestic (or import) commerce the FTAIA requires before conduct could be "regulated by the Sherman Act." *Id.* The same is true of the Fifth Circuit's decision in *Den Norske*, see 241 F.3d at 424-25, and the D. C. Circuit's earlier decision in *Caribbean Broadcasting*, see 148 F.3d at 1085. It is this court, sitting *en banc*, that will be the first one to give a fully considered answer to the question whether the FTAIA strips the federal courts of their competence to hear certain cases that lack sufficient connections to the United States, or if it affirmatively imposes on a plaintiff the burden of proving as an element of its case the existence of those connections.

V

For all these reasons, I believe that the FTAIA adds an element to an antitrust claim for cases, as the statute puts it, that present "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." It does not strip the federal courts of subject matter jurisdiction in those cases—a conclusion that would leave the court powerless to make a ruling on the merits of the case, and that would leave the defendants open to suit either in state courts or before other tribunals, judicial or

arbitral. The majority's conclusion will also have significant effects on the government's criminal antitrust enforcement program. The Sherman Act, of course, makes it a serious felony to enter into an agreement in restraint of trade. The current Acting Assistant Attorney General in charge of the Department of Justice's Antitrust Division, R. Hewitt Pate, recently had the following comments about the Department's international criminal enforcement:

> Since late 1996, the Division has prosecuted international cartels affecting over *$10 billion* in U.S. commerce. Well over 90 percent of the total criminal fines we have obtained in this time period were from international cartel cases .... The international cartels we have uncovered involved a wide range of industries, including the food and feed additives, graphite electrode, vitamins, construction, fine arts, and textile industries ....
>
> Recently, we have concentrated not just on prosecuting corporate cartel members but also on punishing individuals who create and operate the cartels .... In the past fiscal year, defendants in Division cases were sentenced to more than 10,000 jail days—a record—with an average sentence of more than 18 months .... It is not just U.S. executives who are facing prison sentences, but foreign executives as well ....
>
> Turning to our current docket, we now have almost forty grand juries investigating suspected international cartel activity, representing almost half of the Division's criminal investigations.

R. Hewitt Pate, "The DOJ International Antitrust Program—Maintaining Momentum," Speech Before the American Bar Association Section of Antitrust Law, 2003 Forum on International Competition Law, New York City, February 6, 2003, available at http://www.usdoj.gov/atr/

public/speeches/200736.pdf (emphasis in original). The government will not want to conduct these investigations in the Seventh Circuit. Defects going to the subject matter of the court can be raised at any time, even if a defendant has pleaded guilty (and guilty pleas play the same important role in antitrust prosecutions as they do in other fields of criminal law). See, *e.g.*, *United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781, 1785, 152 L.Ed.2d 860 (2002) ("*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.* 'the courts' statutory or constitutional *power* to adjudicate the case, [citing *Steel Co.*]. This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Indeed, even after direct appeals are over, a defect going to the subject-matter jurisdiction of the court can be raised in a motion under 28 U.S.C. § 2255. From this time forth, therefore, any defendant who believes that the prosecutor has failed to meet the standards of the FTAIA in an antitrust prosecution will be free to raise this point either for the first time on appeal, or in a § 2255 petition. Compare *United States v. Gonzalez*, 311 F.3d 440, 443-44 (1st Cir.2002) (rejecting a subject-matter-jurisdictional interpretation of a statute permitting drug prosecutions on stateless vessels).

It is important to recall, finally, that there is nothing unique about international antitrust cases. If effect-on-commerce rules are truly jurisdictional, then they are jurisdictional for every statute that contains commerce elements. Countless statutes do, particularly since the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), because that is what justifies congressional action whenever it legislates under its Article I, Section 8 Commerce Clause powers. The majority's approach therefore has the potential of upsetting

far more than the small set of cases that present foreign trade antitrust issues.

I respectfully dissent.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case No. 94 C 2078.

UNITED PHOSPHORUS, LTD., an Indian corporation; SHROFF'S UNITED CHEMICALS, LTD., an Indian corporation; and J.C. MILLER & ASSOCIATES, INC., an Illinois corporation, Plaintiffs,

v.

ANGUS CHEMICAL COMPANY, a Delaware corporation; ANGUS CHEMIE GmbH, a German corporation; the ESTATE of FREEMAN HUGHES through its representative Yvonne Hughes; OLLIE W. CHANDLER; LOWELL PALS; GARY W. GRANZOW; D.B. GUPTA; and LUPIN LABORATORIES, LTD., an Indian corporation, Defendants.

Decided: February 16, 2001

131 F. Supp. 2d 1003

Before LEVIN, United States Magistrate Judge.

MEMORANDUM OPINION AND ORDER

LEVIN, United States Magistrate Judge:

Before the court are Defendants' motion(s) to dismiss for lack of subject matter jurisdiction (pursuant to Fed.R.Civ.P.12(b)(1)) as to Counts I and II of the second amended complaint.

INTRODUCTION

Plaintiffs are (a) an Indian chemical manufacturer called United Phosphorus, Ltd. ("UPL"), (b) an Indian company entitled Shroff's United Chemicals Ltd. ("SUCL") (Shroff Dep. 25), ("the Indian Plaintiffs") and (c) an American firm, J.C. Miller & Associates ("JCM"), which once had an interest in a joint venture that wanted to sell technology to the Indian Plaintiffs. Defendants are (a) Angus Chemical Corporation and its corporate officers, Freeman Hughes, Ollie Chandler, Lowell Pals, Gary W. Granzow (collectively "Angus"), (b) Angus Chemie GmbH ("Chemie"), and (c) Lupin Laboratories, Ltd. and its officer and owner D.B. Gupta (collectively "Lupin"). Counts I and II of the second amended complaint, essentially, allege that Defendants attempted to monopolize, monopolized and conspired to monopolize the market for certain chemicals in violation of § 2 of the Sherman Antitrust Act. 15 U.S.C. § 2.

Defendants threshold argument is that the court lacks subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act ("FTAIA"), which limits application of the Sherman Act to conduct with a "direct, substantial, and reasonably foreseeable effect" on domestic commerce . 15 U.S.C. § 6a.

BACKGROUND FACTS

The following was expressed by the District Court in ruling on a motion under the original complaint herein:

> India currently has the greatest incidence of tuberculosis in the world. The primary pharmaceutical drug used in India to cure this potentially fatal illness is Ethambutol. Two chemicals, 2-Amino-1 Butanol ("AB"), the key ingredient of Ethambutol, and 1-Nitro-Propane ("1-NP"), the raw material used to make AB, are the subjects of this litigation.

> To make Ethambutol, Indian chemical laboratories, including Defendant Lupin, use AB, which they buy from Defendant Chemie, currently the world's only manufacturer of AB. Chemie, a German subsidiary wholly owned by Defendant Angus, uses 1-NP as raw material to manufacture AB at its plant in Germany. Angus, a Delaware Corporation in the business of manufacturing and selling chemical products, makes 1-NP at a plant in Sterlington, Louisiana, and is presently the world's only manufacturer of 1-NP. Mem. Op. & Order, 1994 WL 577246, *1 (N.D.Ill. Oct. 18, 1994).

The lawsuit in this case stems from prior trade secret litigation between several of the parties. In the early 1990's, the Indian Plaintiffs began to consider manufacturing AB. The Indian Plaintiffs planned to acquire the technology for making AB, and its raw material 1-NP, from Dr. John Miller (owner of JCM) who also was the former Vice President of Research and Development for Angus (makers of AB and 1-NP). While at Angus, Miller supervised Angus's propriety efforts to improve its AB processes and had ongoing access to the manufacturing process details for Angus's products.

Defendants position was as follows: While Rajju Shroff (the principal of Indian Plaintiffs) worked to acquire AB technology from Dr. Miller, he concealed Miller's identity and background from his own government by filing an official application to the Indian government falsely declaring that the technology for the AB process would be acquired from a different scientist, Dr. Phillip Adams. Adams Dep. 99-101, 133. Shroff, assertedly, withheld Miller's involvement in the project stating that Angus didn't "know that we [Shroff and Miller] are in touch." They still think it is Dr. Phil Adams. Letter from Shroff to Miller (July 30, 1991) (DX 41).

Avowedly, as soon as Angus learned that Shroff would be obtaining AB technology from Miller, Angus filed suit in the Circuit Court of Cook County ("the Cook County Action") to enjoin Miller from misappropriating its trade secrets. Two years later, when Angus was faced with a discovery ruling that would have required it to disclose the very details of the technology it sued to protect, Angus voluntarily dismissed its own suit.

The following year, in 1994, Plaintiffs initiated this action challenging Angus's pursuit of the Cook County Action. The Indian Plaintiffs allege that, but for Angus' initiation of the Cook County Action, Plaintiffs would have sold AB as well as other chemicals for profit. Moreover, JCM claims that it would have sold technology to the Indian Plaintiffs and others. Thus, in the second amended complaint, the Indian Plaintiffs alleged, *inter alia*, that they intended to manufacture AB, 1-NP and certain other specified chemicals and that Defendants used various anti-competitive means to thwart Plaintiffs' plans.

RELEVANT STATUTE

The FTAIA, states:

Sections 1 to 7 of this title (Sherman Act) shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect —
>
> > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> >
> > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States. 15 U.S.C. § 6a (1982).

ANALYSIS

Defendants move to dismiss Plaintiffs' second amended complaint for lack of subject matter jurisdiction. [1]

I. Subject Matter Jurisdiction

A. Direct, Substantial, And Reasonably Foreseeable Effect On Domestic Commerce.

Defendants threshold argument is that the court lacks subject matter jurisdiction because Plaintiffs have failed to demonstrate that Defendants' alleged antitrust conduct has a "direct, substantial, and reasonably foreseeable effect" on United States commerce as required by the FTAIA.

Section 1 of the Sherman Act prohibits conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization "of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. Section 6a, *supra*, which was added to the Sherman Act in 1982, sets forth the criteria for determining United States antitrust jurisdiction over international business transactions. 15 U.S.C. § 6a.

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[1] In this regard:

"The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Long v. Shorebank Development Corp.*, 182 F.3d 548, 554 (7th Cir.1999) (quoting *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir.1993) (per curiam)).

In 1982, Congress enacted the FTAIA as an amendment to the Sherman Act to clarify the extraterritorial reach of the federal antitrust laws. *O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 451 (2d Cir.1987); Roger P. Alford, "The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California," 34 Va.J.Int'l L. 213, 216 (1993). The purposes of the FTAIA, as set forth in its legislative history, are to "encourage the business community to engage in efficiency producing joint conduct in the export of American goods and services" and to amend the Sherman Act to create a unitary statutory test to determine whether American antitrust jurisdiction exists over certain international transactions. H.R.Rep. No. 686, 97th Cong., 2d Sess., reprinted in 1982 U.S.Code Cong. & Ad. News 2487.

Congress enacted the FTAIA because it believed that American jurisdiction over international commerce should be limited to transactions that affect the American economy. *Hartford Fire Ins. v. California*, 509 U.S. 764, 796, n. 23, 113 S.Ct. 2891, 125 L.Ed.2d 612 (citing H.R.Rep. No. 686, 97th Cong., 2d Sess., reprinted in 1982 U.S.Code Cong. & Ad. News 2487); Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 236'a (Supp.1992). Congress believed that "the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 272h2 (1997) (emphasis in original). With this in mind, Congress amended the Sherman Act by passing the FTAIA so that jurisdiction over foreign commercial conduct would not be exercised unless such conduct had a "direct, substantial, and reasonably foreseeable effect" on United States commerce. Moreover, Congress intended that the antitrust laws would not be "triggered ... by any minor impact," but only by "direct, substantial, and reasonably foreseeable" effects on United

States commerce. Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272h2 (1997).

Under the FTAIA, the proscriptions of the Sherman Act apply to trade or commerce with foreign nations, other than import transactions, only when the conduct providing the basis for the claim has a direct, substantial and reasonably foreseeable anticompetitive effect on United States domestic commerce. The amendment was clearly intended to exempt from United States antitrust law conduct that lacks the requisite domestic effect, "even where the antitrust conduct originates in the United States or involves American-owned entities operating abroad." *Optimum, S.A. v. Legent Corp.*, 926 F.Supp. 530, 532 (W.D.Pa. 1996).

The FTAIA does not, however, preclude all persons or entities injured abroad from recovering under United States antitrust laws. When the activity complained of has a demonstrable effect on United States domestic commerce, foreign corporations injured abroad may seek recovery under the Sherman Act. As the House Report states, the FTAIA "preserves antitrust protections in the domestic marketplace for all purchasers, regardless of nationality or the situs of the business ..." H.R.Rep. No. 686, 97th Cong., 2d Sess., reprinted in 1982 U.S.Code Cong. & Ad. News 2487.

The effect on domestic commerce required by the FTAIA must be sufficient to "give[] rise to a claim" under the Sherman Act. 15 U.S.C. § 6a(2). A plaintiff's showing of domestic effects must include a demonstration of "antitrust injury to the market or to competition in general, not merely injury to individuals or individual firms." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 815 (9th Cir.1988); *see, e.g., Blackburn v. Sweeney*, 53 F.3d 825, 830 (7th Cir.1995) (antitrust claim requires injury due to "effects ... on competition"); *Dial A Car, Inc. v. Transportation, Inc.*, 82 F.3d 484, 486 (D.C.Cir.1996) (antitrust claim requires

"anticompetitive impact on the market as a whole"). Moreover, conduct on American soil is not always sufficient to prove effect on domestic commerce because it is the situs of the effect, not the conduct, which is crucial. *Liamuiga Tours, Div. Of Caribbean Tourism Consultants, Ltd. v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 924 (E.D.N.Y.1985).

As discussed hereinafter, the court finds that the alleged conduct underlying Plaintiffs' claims can have had no effect on any United States commerce in the chemicals that Plaintiffs state they would have manufactured. Discovery has revealed that there is only one chemical as to which Plaintiffs took even preliminary steps—AB, which Plaintiffs did not intend to sell in the United States. Plaintiffs may have considered making 1-NP, but only for their own use in manufacturing AB. As for the other chemicals named in the second amended complaint, the record shows, at most, that Plaintiffs had a conclusory intent to think about making them at some point in the future. Respectfully, conjecture alone, however, cannot establish the necessary domestic effect under the FTAIA, as a matter of law. *McElderry v. Cathay Pacific Airways, Ltd.*, 678 F.Supp. 1071, 1078 (S.D.N.Y.1988) (FTAIA requires more than "speculative" domestic effects). Plaintiffs' "failure to establish any anticompetitive domestic effect [is] jurisdictional," implicitly fails to meet the requisite "direct, substantial, and reasonably foreseeable effect" test and requires dismissal of their antitrust claims. *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1544 (9th Cir.1994).

B. A Showing Of The Requisite Effect On Domestic AB Sales Has Not Been Made.

In late 1990 and early 1991 Plaintiffs decided to manufacture AB in Vapi, India. 2d Am. Cmplt. ¶ 55. Plaintiffs planned to manufacture AB by using technology

developed through a joint venture called Miller-Deltachem, in which JCM was one of the principals. *Id.* ¶¶ 57, 59.

Plaintiffs first allege that Defendants used various anticompetitive means to interfere with Plaintiffs' AB plans, including making threats against Plaintiffs' potential AB customers and initiating a "sham" state court lawsuit (the Cook County action) in 1991 to prevent JCM's principal, Miller, (Angus's former Vice President for Research and Development) from divulging Angus' trade secrets. 2d Am. Cmplt. ¶¶ 85-89, 97(b)-(e). Defendants maintain, however, that even if Plaintiffs' allegations of misconduct have merit, the evidence demonstrates that there could have been no effect on domestic commerce.

1. Plaintiffs Would Not Have Sold AB In The United States.

Plaintiffs threshold argument is that they would have sold AB in the United States if the Defendants had not intentionally interfered with their efforts to manufacture AB. Defendants, however, argue that Plaintiffs never intended to sell AB in the United States and that Plaintiffs, even if they had wanted to, could not have made any AB sales in the United States. Defendants further assert that even if their alleged scheme to prevent the Plaintiffs from manufacturing AB had been successful, it could have had no effect on domestic commerce, must less the required "direct, substantial, and reasonably foreseeable effect" sufficient to give rise to a cause of action under the Sherman Act. They assert that the FTAIA requires dismissal of Plaintiffs' claims.

a. Plaintiffs Did Not Have An Intent (Or Ability) To Sell AB In The United States.

The evidence in this case indicates that Shroff began to develop plans to manufacture AB after Phillip Adams (Shroff's consultant) told him that it was a "good project for

India." Shroff Dep. 35-36. Moreover, Anant Thakore, a past president of the Indian Drug Manufacturer Association, who has been involved in the Indian AB business since the early 1970s and who is considered to be "the best authority in India" on the subject, testified that Indian buyers purchase 90-95% of the world's AB supply. Thakore Dep. 38, 285-86, 328, 390; *see also id.* at 63 ("potential customers [for AB] were anyone who makes ethambutol in India").

The record demonstrates that Miller learned about Shroff's companies at a meeting with Adams and one of Shroff's chemical brokers, Eugene Klim. At the meeting, Miller told Adams and Klim that he "was interested in talking with [UPL] because he had business that would be very good in India," and that "he had a process for making [AB] whose market is in India." Klim Aff. ¶ 9 (DX 140); Klim Dep. 45-47. Moreover, Adams told Miller that he would pass on Miller's card to Shroff because "Miller said that the market was in India" and "we had no need for [AB] in this country. Adams Dep. 83; *see also id.* at 81-82 (Miller said that "the AB product would be used in India.") Klim himself had "no interest" in AB because, as he swore in an affidavit submitted in the Cook County action, "the market for it is in India with no U.S. business." Klim Aff. ¶ 11 (DX 140); *see also* Klim Dep. 54, 56-57.

The day after the meeting with Miller, Klim alerted Shroff to an opportunity to license a "proven process" to manufacture a product for which there is "an ongoing requirement in India for 1.5 million lbs." Letter from E. Klim to R. Shroff (Feb. 8, 1991) (DX 2); *see* Klim Dep. 71-72; Shroff Dep. 40-42. That product turned out to be AB and the source of the technology was Miller-Deltachem. Shroff Dep. 42; 2d Am. Cmplt. ¶ 59. Klim's report to Shroff on the Indian demand for AB was based on Miller's estimate of "the value of this whole thing." Klim Dep. 72. A subsequent letter to Shroff, which Miller drafted for Klim, stated that

the demand for AB was "1.5 million lbs used in India" and [a]nother potential "1.5 million lbs in China," and that "this product would be used exclusively in Asia (especially India)." Letter from E. Klim to R. Shroff (Feb. 21, 1991) (DX 4); *see* Facsimile from J. Miller to E. Klim (undated) (DX 143); Miller Dep. 144; Klim Dep. 82; Shroff Dep. 52, 55. The Miller/Klim letter makes no mention of any possible use for AB in the United States.

Two months later, Shroff advised Miller that "there is [a] reasonably good market in India based upon his company's evaluation of "published import figures" from the Indian government." Letter from R. Shroff to J. Miller (Apr. 18, 1991) (DX 6); Shroff Dep. 64, 67. Miller responded with a letter describing the "market for AB in India" and projecting annual sales and gross profits for UPL based on the assumption "that UPL pursues only the India AB potential" and not also "the Chinese AB market." Letter from J. Miller to R. Shroff (Apr. 22, 1991) (DX 7); *see* Shroff Dep. 71-72. Neither letter mentions any possibility of selling AB in the United States.

Shroff's plans for the size of his AB plant confirm that Plaintiffs' production and sale of AB was to be limited to India. The Indian Plaintiffs' Application for Foreign Collaboration submitted to the Indian government estimated the Indian Plaintiffs' annual production of AB in metric tons per year, assuming that the plant would not reach "full capacity" until its third year of operation. Application at 4 (DX 8); *see* Shroff Dep. 78, 132-33. "Full capacity" for Shroff meant 1000 metric tons of AB per year, which was precisely his estimate of the annual demand for AB in India:

> Q: So your estimate was you planned to build a plant with an annual capacity of 1,000 metric tons of AB based upon your assessment that the demand in India for AB was approximately that?

A: Yeah.

Shroff Dep. 134.

The fact that Plaintiffs' AB plans were limited to non-United States markets is further demonstrated by Plaintiffs' intent to sell AB for use only in manufacturing ethambutol, which is not made in the United States.[2] Morecver, Shroff knows of no "other uses for AB except for the manufacture of ethambutol." Shroff Dep 147; *see also id.* at 773 ("AB that United Phosphorus might undertake to make would be used for the production of Ethambutol"). Miller also denied any knowledge that "Shroff or his companies planned to do anything with AB other than to sell it to ethambutol makers." Miller Dep. 405. Moreover, Plaintiffs' litigation consultant Peter Kizuik, who was formerly sales manager for nitroparaffins at Angus's competitor, W.R. Grace, knows of no application for AB other than the production of ethambutol. Kizuik Dep. 49, 51, 104.

The record further demonstrates that Plaintiffs would not have sold AB to the Italian facility of American Cyanamid or its subsidiary Lederle. Angus DC Br. 12, 14-16. During the period covered by Plaintiffs' lawsuit, the Lederle division of the American Home Products (formerly a division of American Cyanamid), was the only company in the world, that had FDA approval to sell ethambutol domestically. Lederle imported ethambutol into the United States from Italy, where it made ethambutol using an AB intermediate that it buys in India. *Id.* ¶ 7; *see also* Gupta Dep. 122-24; 430-31; 432-33; Leffler Dep. 492 (aside from Lederle, "[n]obody else sells" ethambutol in the United States). The record shows that the very small amount of AB that was sold in this country during the relevant time period

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[2] It appears no company has manufactured ethambutol in the United States during the entire period covered by Plaintiffs' claims. Little Aff. ¶¶ 4, 7.

was used solely as an ingredient in a product for making rocket motors which was unrelated to ethambutol (the only use of AB for which Plaintiffs were aware.)

Plaintiffs allegation that they would have sold AB to American "laboratory supply houses" (Pls. DC Br. 11 n. 2, 12, 14-15) and that "there was every reason to think that" Miller eventually would have told Shroff about supply houses is not supported by the record. Pls. DC Br 12 n. 5. The record demonstrates that Shroff had no plans to sell AB to supply houses, did not know about this outlet for AB sales, and had no interest in it. Clearly Plaintiffs had no intention of selling AB to American supply houses because neither Miller nor Shroff ever had any discussions with a single American supply house. Miller Dep. 413: Shroff Dep. 144-45, 161-62. Rather, as of the documents and testimony reveal, Plaintiffs intended to sell AB to ethambutol makers abroad. The record in the case reveals only that Miller's former partner Burkholder "may have" talked to supply houses about AB (*see* Pl.'s DC Br. 27). Miller testified that Burkholder "may have mention [AB] ... [I]t's certainly a possibility. I don't know." Miller Dep. 543-44.

The record further demonstrates that if Plaintiffs could have sold to supply houses, such sales would not amount to any kind of "substantial effect" on domestic commerce. Plaintiffs' catalogues indicate that supply houses sell AB in tiny volumes—offering AB in 1-gram to 500-gram quantities as effective prices ranging from $142 to $18,600 per kilogram. *See* Pls. Exs. A, B. In comparison, Angus sold AB to 3M in 1994 for $15.76 per kilogram. (DX 296) The record clearly indicates that AB is not purchased in significant quantities from supply houses.

This court finds that based on the record that Plaintiffs had no actual plans to sell AB in this country and that there would have been no significant AB sales opportunities for Plaintiffs in this country even if they had tried to sell AB

here. For instance, Miller testified that he "had no conversation with any potential customers for AB in the United States." Miller Dep. 413. Moreover, Shroff testified that he and his "marketing man"spoke with ten to twelve potential AB customers, all of which were located in India. Shroff Dep. 144-45, 161-62. Plaintiffs have put forth no evidence tending to show that, but for the claimed antitrust violations, they would have sold AB domestically.

It is clear that Plaintiffs cannot carry their burden of showing a "direct, substantial, and reasonably foreseeable effect" on domestic commerce under the FTAIA. As Plaintiffs' own liability expert agreed, "any effect upon United States commerce, based on what [he has] seen with respect to AB sales" would be "less than substantial." Leffler Dep. 475-76.

b. The Only Domestic AB Buyer Would Not Have Purchased AB From Plaintiffs.

While Plaintiffs assert that they would have sold AB in the United States, Defendants argue that they would have found no buyers.

The evidence indicates that during the time period covered by Plaintiffs' claims, 3M was the only customer in the United States that purchased AB. AB Customer Sales 1992-1994 (Ex. A); Littel Aff. ¶¶ 5-7 (Ex. L). Plaintiffs' expert acknowledged that "the only AB that's sold in the United States is to 3M." Leffler Dep. 443; *see also* Angus Off-Schedule Price Authorization (eff. Jan. 1, 1994) (DX 296) (all AB other than AB sold to 3M "is sold outside the United States").

Dr. Anthony Manzara, Division Scientist at 3M, testified that 3M purchases "very small amounts" of AB which is used by others in the manufacture of rocket motors. Manzara Dep. 25-26, 29. Between 1992 and 1994, 3M purchased less than 0.4% of the world's AB production manufactured for sale, with 1994 sales to 3M totaling under

$25,000 (representing 0.16% of all sales and 0.14% of total volume.) AB Customer Sales 1992-1994 (Ex. A); Littel Aff. ¶ 5 (Ex L). Dr. Leffler characterized Angus's AB sales "in the United States [as] trivial." Leffler Dep. 467.

The record indicates that this small amount of AB business would not have been available to Angus' competitors. For example, 3M has never conducted any formal bidding for its AB purchases and it have never solicited offers from other AB suppliers, even when W.R. Grace, a well-know Angus competitor, offered AB for sale. Manzara Dep. 31, 45. Dr. Manzara explained that 3M purchases Angus's AB because of its "quality, purity and general reliability," that 3M is contractually bound to give its customers six-months notice of any change in its AB supplier, and that changing 3M's AB supplier entailed a risk of producing an inferior product, which could "jeopardize 3M's AB supplier relationship" with its customers. *Id.* at 32-35, 44-45.

As a result, 3M's AB purchases are "too small—and the risk and effort required to switch ... are too great—for 3M to change its AB supplier, as long as Angus supplies good quality product on a timely delivery schedule without unreasonable price increases." *Id.* at 46. Dr. Manzara testified that the risks and costs of changing AB supplier's "would overwhelm any possible savings." *Id.* at 46. He further stated that even if Angus "had doubled the price" of its AB, "it probably would not have been a major concern" to 3M. *Id.* at 114. Furthermore, even if a new supplier (like Plaintiffs) offered to cut Angus' AB prices in half, 3M "probably wouldn't be interested." *Id.* at 139.

This court finds that 3M would not have purchased AB from Plaintiffs and consequently, there would be no applicable "direct, substantial and reasonably foreseeable effect" on domestic commerce.

c. Plaintiffs Cannot Bootstrap By Claiming Effects On Domestic Ethambutol Sales.

Defendants assert that Plaintiffs cannot claim domestic injury by supposing that their exclusion from the Indian AB business had an effect on domestic sales of ethambutol. Any alleged effect would not result in an injury to Plaintiffs because they have not claimed that they either (1) intended to make ethambutol, or (2) were prevented from making a single ethambutol sale. Moreover, during the relevant time period, Lederle had the required FDA authorization to provide ethambutol to domestic consumers.

The record indicates that there is no factual basis by which Plaintiffs can claim that there is a link between alleged misconduct in claimed foreign AB markets and the supply or price of Lederle's ethambutol in the United States. Plaintiffs' expert Dr. Leffler has no opinion about whether domestic ethambutol sales are themselves "substantial," and he has conducted no analysis of how changes in overseas AB prices affect the price of ethambutol that Lederle sells here. Leffler Dep. 492-93, 495. Moreover, based on the record, there is no reason to suppose that Lederle, the only domestic ethambutol supplier, would have purchased AB from a new supplier like Plaintiffs. As Dr. Leffler noted, Lederle could lose its FDA approval by changing AB suppliers. *Id.* at 47. Furthermore, both Shroff and Miller testified that they never spoke to anyone at Lederle or American Cyanamid about the possibility of selling AB to Lederle. Shroff Dep. 163; Miller Dep. 405. Since the early 1990's, Lederle has satisfied its needs by purchasing an intermediate, D2AB, that its supplier Lupin Laboratories makes in India with AB from Angus. *See* Gupta Dep. 430-31.

The FTAIA explicitly bars antitrust actions alleging restraints in foreign markets for inputs (such as AB) that are used abroad to manufacture downstream products (like

ethambutol) that may later be imported into the United States. Clearly, the domestic effects in such a case, if any, would obviously not be "direct," much less "substantial" and "reasonably foreseeable." *Papst Motoren GmbH v. Kanematsu-Goshu, Inc.*, 629 F.Supp. 864, 869 (S.D.N.Y. 1986) ("Papst's alleged restraint on STC in Japan cannot be said to have an anticompetitive effect upon United States commerce based upon [the] later sale of STC manufactured motors in the United States, since jurisdiction over Sherman Act claims 'is not supported by every conceivable repercussion of the action objected to on United States commerce.'"); *see also* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 364a (rev. ed.1995) ("radiating injuries through the economy are far beyond the ability or willingness of antitrust courts to trace and measure").

In *Eurim-Pharm*, the court rejected an attempt to establish jurisdiction by claiming that restraints abroad "had a spillover effect on domestic commerce" and noted that "this is precisely the type of case Congress sought to eliminate from United States antitrust jurisdiction." *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F.Supp. 1102, 1106-07 (S.D.N.Y.1984). When the court denied Plaintiffs' motion to compel discovery regarding the Lupin Defendants' sales to ethambutol manufacturers, it recognized that claimed effects on a domestic ethambutol market are insufficient to establish subject matter jurisdiction in a case alleging misconduct in overseas markets for products used to manufacture ethambutol. Tr. 40. (Nov. 30, 1999) (Ex. D) ("there is not subject matter jurisdiction, because it winds up with an end product that is different than was sold in Italy"). In view of the foregoing, the court finds that this claim of Plaintiffs' cannot stand.

2. Defendants Have Not Stopped Plaintiffs From Making AB.

Plaintiffs claim that Defendants were the cause of Plaintiffs' failure to sell AB in the United States. Defendants counter that Plaintiffs now are making AB and that Plaintiffs' long delay in making AB was purely a matter of their own business choice.

The record shows that Shroff testified in 1996 that he was waiting for *this* litigation filed by *his* companies to conclude before going forward with AB production. *See, e.g.*, Shroff Dep. 481, 684, 708-09. By March 1999, however, Shroff had determined that his lawsuit was moving too slowly, and he decided to begin making AB. *Id.* at 756-57; *see also* Dave Dep. 92 (Shroff instructed his scientists to begin work on AB in mid-1998). The evidence indicates that UPL has "produced samples [of AB] and [is] working on pilot plant production," using a successful AB process that is "really simple and good" and that requires only "easily available" raw materials. Shroff Dep. 761-62, 767, 770-71; *see also* Dave Dep. 95-101 (raw materials and equipment necessary for UPL to make AB are easily available.) UPL, thus, was prepared to go into full production "as soon as possible." Shroff Dep. 761. Moreover, UPL's general manager of research and development testified that he was confident that UPL can manufacture and sell AB more cheaply than Angus can. Dave. Dep. 104.

Accordingly, this court finds that Plaintiffs' failure to sell AB in the United States was a consequence of Plaintiffs' own business decisions and thus, cannot be considered as an "effect" of any conduct of Defendants.

C. A Showing Of The Requisite Effect On Domestic 1-NP Sales Has Not Been Made.

Plaintiffs claim that there is demand for 1-NP in the United States and that Defendants prevented the Indian Plaintiffs from manufacturing 1-NP, which they allege

would also have been made with technology provided by Miller-Deltachem. *See, e.g.*, 2d Am. Cmplt. ¶¶ 95, 117(b), 158(b). Defendants, aver, however, that Plaintiffs began to consider manufacturing 1-NP only to fulfill their own requirements for AB production and not for sale in the United States. *Id.* ¶¶ 92-95.

The record demonstrates that Plaintiffs' 1-NP plans were limited to 1-NP production for Plaintiffs' own use to make AB. Angus DC Br. 17-18. For instance, Shroff testified that he did not believe that any other market exists for 1-NP:

> Q: And your intent at the time was to make 1-NP to use as a raw material for the manufacture of AB?
>
> A: That's right.
>
> Q: You had no intention of selling 1-NP anywhere else or doing anything with 1-NP other than making—
>
> A: There's no market.
>
> Q: There's no market for 1-NP?
>
> A. I don't think so.

Shroff Dep. 215-16. As a result, Plaintiffs intended to manufacture 1-NP only for their own account to make AB. *Id.* at 445-46 (Shroff's plan "for the 1-NP that [he] planned to make" was "[t]o produce for our own requirements," and AB was the "only" product that Shroff "had in mind" for 1-NP). Moreover, Shroff never investigated any uses for 1-NP other than making AB. *Id.* at 907. Furthermore, because Plaintiffs had no plans for 1-NP other than for their own use, they never identified a single potential American consumer for 1-NP. Miller Dep. 368-69.

Shroff testified that in order to make 1-NP, Plaintiffs would need a new plant; however, they did not "draw up any plans or blueprints" or "have any discussions with contractors or construction companies." Shroff Dep. 444.

Thus, there are no "written business plans or projections" of any kind involving 1-NP. *Id.* at 445. However, while the record shows that Plaintiffs did consider purchasing W.R. Grace's ("Grace") nitroparaffins plant in Deer Park, Texas, Shroff's $5 million offer was considered grossly inadequate because Grace had determined that $20 million was an appropriate sales price. Neeves Dep. 78, 83, 96; Kiziuk Dep. 192-93. In fact, Plaintiffs' litigation consultant Peter Kiziuk testified that a $5 million offer was "insufficient and that anyone who made such an offer wasn't a serious contender." Kiziuk Dep. 192-93.

As demonstrated by the record even though Plaintiffs claim they had no available source to purchase 1-NP (2d Am. Cmplt ¶¶ 92-95), it is unclear whether the Indian Plaintiffs would have manufactured 1-NP for their own use in the production of AB. There are three other methods for making AB that do not require 1-NP. Thakore Dep. 336-37; *see also* Dave Dep. 95, 98, 101-102, 106 (describing three ways to make AB without 1-NP). JCM had contracted with the Indian Plaintiffs to develop a process for making AB that did not require 1-NP. Miller Dep. 415-16, 420; Shroff Dep. 467. Moreover, UPL's general manager of research and development reports that UPL is working on two different methods for making AB that do not involve 1-NP, and it expects to undercut the price of the AB that Angus makes using 1-NP. Dave Dep. 95, 98, 101-02, 104; *see also* Shroff Dep. 766-67, 770-71. Because the Indian Plaintiffs have decided to make AB without 1-NP, Shroff states they have no plans to manufacture 1-NP. Shroff Dep. 773. The court also notes that Plaintiffs' damages expert has not opined that they are entitled to any damages for lost sales of 1-NP. *See* Zmijewski Report 8, 16-19 (DX 297).

This court finds that based upon the record that the Indian Plaintiffs did not have firm plans to manufacture 1-NP and that they intended to manufacture 1-NP only for the

purpose of making AB in India and never considered selling it in the United States. Plaintiffs' own 1-NP needs were also uncertain (and are now non-existent) given the alternative methods for producing AB.

Plaintiffs, therefore, cannot sustain their burden under the FTAIA by claiming anticompetitive effects in an alleged domestic 1-NP market. This court finds that it would be speculative to suppose that any alleged conduct that prevented the Indian Plaintiffs from making 1-NP could have had any domestic 1-NP sales, far less a "direct, substantial, and reasonably foreseeable effect" sufficient to give rise to a Sherman Act claim. Such speculation cannot overcome the jurisdictional bar of the FTAIA. *McElderry*, 678 F.Supp. at 1078 (domestic effects that were "at best[] speculative" did not satisfy FTAIA); *Liamuiga Tours*, 617 F.Supp. at 925 (dismissing action because "while the effects in St. Kitts are substantial, at best domestic consequences are speculative").

Furthermore, it bears noting at this juncture that Plaintiffs' assertion that but for the actions of Angus, they would have purchased the Grace nitroparaffins plant, moved it to India, and then used it to manufacture chemicals there for sale in the United States is unavailing. The record evidence was that Angus played no role in this situation. Even more importantly, the record establishes that Plaintiffs' $5 million offer to purchase the nitroparaffins plant was clearly insufficient. Thus, Plaintiffs were not considered to be serious contenders.

D. A Showing Of The Requisite Effect On Domestic Sales Of Other Chemicals Has Not Been Made.

Plaintiffs allege in their second amended complaint that Defendants prevented them from manufacturing (1) other basic nitroparaffins in addition to 1-NP (*i.e.*, 2-nitropropane ("2-NP"), nitromethane ("NM"), and nitromethane ("NE"); (2) other nitroparaffin derivatives including tris amino, 2-

amino-2-methyl-1-propanol ("AMP"), and bronopol; and (3) a variety of other chemicals, including tertiary butyl amine, guanidine carbonate, phosgene, an ester made from AB "bottoms," a gas scrubbing agent, chloropicrin, and sodium sulfate. *E.g.*, 2d Am. Cmplt. ¶¶ 98-100, 108, 116, 117(c)-(d), 158(d). Defendants, however, assert that Plaintiffs' had no specific plans to manufacture these additional chemicals (i.e., there was no agreement with Miller-Deltachem to develop the technology to manufacture the chemicals) and in fact, Plaintiffs' plans for manufacturing these chemicals were nothing more than speculative.

1. Plaintiffs Had No Plans To Manufacture Or Sell Other Nitroparaffins.

Plaintiffs contend that Defendants' scheme to prevent Plaintiffs from manufacturing 1-NP also prevented them from manufacturing other nitroparaffins because "[m]aking 1-NP necessarily entails making" all four of the basic nitroparaffins. Pl.s Br. in Opp'n 17 (filed July 7, 1994). However, as has already discussed, Defendants maintain that Plaintiffs would never have made 1-NP under any circumstances. Rather, the Indian Plaintiffs intended to make 1-NP only to supply their own needs for manufacturing AB, and there are a number of methods for making AB that do not require 1-NP, including ones the Indian Plaintiffs have used.

The record demonstrates that Plaintiffs would not have manufactured 1-NP by nitrating propane because it generates a large amount of waste material. Miller Dep. 251-52. If Plaintiffs had manufactured 1-NP for their own use, they would have done so using a method that produces no other chemicals. The record further shows that based on Plaintiffs' "production assumptions," they would not have nitrated propane to produce 1-NP. Plaintiffs would have satisfied any needs for other basic nitroparaffins (in particular, NM) on the open market. Zmijewski Report 9-10

(DX 297). Plaintiffs, thus, reached an agreement that Miller-Deltachem would provide the Indian Plaintiffs with technology for manufacturing 1-NP without making other products. Shroff Dep. 394-95, 400.

2. Plaintiffs Had No Plans To Manufacture Or Sell Other Nitroparaffin Derivatives.

Plaintiffs allege that they intended to manufacture nitroparaffin derivatives which included, tris amino, bronopol and AMP because these chemicals would have been "natural business expansions" after making AB and 1-NP. Pls. DC Br. 26 n. 11. Defendants, contend, however, that Plaintiffs had no actual plan to manufacture these nitroparaffin derivatives.

The evidence demonstrates that Plaintiffs had not plan to manufacture bronopol. For instance, Miller has never done any work on bronopol, and he regards it as "[n]ot certain," but merely a "probability," that Plaintiffs will ever make bronopol, even after AB production begins. Miller Dep. 92-93, 96; *see also* Adams Dep. 57, 69-71 (Shroff rejected bronopol technology offered by his consultant Adams in 1991). Moreover, Shroff completely lost interest in bronopol after discovering that two other Indian companies were already making it: "Usually we produce chemicals where there is hardly any competition." Shroff Dep. 896-97; *see also* Adams Dep. 57, 69-71. Furthermore, Miller "never did any lab work regarding the commercialization" of any other nitroparaffin derivatives listed in the complaint, and he "never did any business plan type document" with respect to these chemicals. Miller Dep. 200, 202.

With regard to tris amino and AMP, the only steps the Indian Plaintiffs took towards manufacturing nitroparaffin derivatives includes a "literature survey," where they were not able to identify a single use or potential buyer for tris amino or AMP. Shroff Dep. 715-16, 718, 902-03. Moreover, a

"very preliminary report" of lab work concerning bronopol was never completed. Dave Dep. 175-76; *see also id.* at 121-22 (no "research and development efforts" of any kind regarding other derivatives.) In addition, decisions at UPL about which products to pursue were made by a committee that kept written minutes, and UPL has a policy requiring its scientists to keep written records of any lab work. Dave Dep. 55-58, 61. The record reflects, however, that no documents were produced reflecting a plan to manufacture these chemicals. Furthermore, Miller never discussed his ideas for making AMP with Shroff. Miller Dep. 200, 202.

The evidence further shows that Shroff testified that Plaintiffs are waiting for the conclusion of this litigation before moving forward with their plans to make nitroparaffin derivatives. *See, e.g., id.* at 705-06 ("as soon as this litigation is over we will go ahead"); *id.* at 715-16 (Shroff's company decided to wait until litigation concludes before "moving forward with its consideration of making" tris amino, bronopol, and AMP); *id.* at 718-19 (AMP plans are on hold because Shroff is "[w]aiting for the litigation to be over"); *id.* at 773-74 (with respect to AMP, tris amino, and bronopol, "[w]e will make it after the litigation is over, but ... we may go earlier.") The record thus demonstrates that its Plaintiffs' own business decisions that have kept them from progressing towards making nitroparaffin derivatives.[3]

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[3] Plaintiffs reliance on *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977) is, respectfully, inapposite. *See* Pls. DC Br. 26 n. 11. In that case, a jury awarded damages to a manufacturer of automobile air conditioners for air conditioner models that it actually made and also for models that it did not make (having been unlawfully excluded from making those). The court held that this issue concerned the "growth ... of ongoing business" rather than "the expansion of a present business into a new [product] market," and that the plaintiff therefore was not required to show "the preparedness and intent to expand in these areas." *Heatransfer*, 553 F.2d at 986 n. 20. By contrast, Plaintiffs' contention here that they would have sold tris amino, bronopol

3. Plaintiffs Had No Plans To Manufacture Or Sell The Other Chemicals Named In The Second Amended Complaint.

Plaintiffs allege that they would have manufactured tertiary butyl amine, guanidine carbonate, phosgene, an ester made from AB "bottoms," a gas scrubbing agent, chloropicrin and sodium sulfate if Defendants had not interfered with their attempts to do so. In contrast, Defendants allege that the record clearly shows that Plaintiffs would never have manufactured these chemicals.

The record demonstrates that Plaintiffs engaged in preliminary discussions regarding the manufacturing of these chemicals. For instance, Plaintiffs engaged in some discussion regarding the possibility of manufacturing tertiary butyl amine and agreed to "follow up at a later date" but never did. Miller Dep. 283-84. Plaintiffs also discussed the possibility of making guanidine carbonate in India although they did not discuss any timetable because they were "waiting to do AB first and then move on to other projects." *Id.* at 298. Guanidine carbonate was just "somewhere down the road." *Id.* at 622.

Plaintiffs had not engaged in research and development efforts with respect to most of the chemicals. For example, regarding phosgene, Plaintiffs have made no research and development efforts because their factory is located next to a plant that makes phosgene which allows them to receive it through a direct pipe. Shroff Dep. 859. Furthermore, in most instances, Plaintiffs had made no efforts to make or sell the chemicals (*see id.*) and had not identified customers for which the chemicals could be sold. *See, e.g.*, Miller Dep. 637-38.

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and AMP in this country clearly involves the "expansion" of their business into new product markets. Thus, unlike the plaintiff in *Heatransfer*, Plaintiffs must show "preparedness and intent," which they cannot do.

This court finds that the record demonstrates that Plaintiffs had no plan to manufacture and sell other nitroparaffins, nitroparaffin derivatives and the other chemicals discussed, *supra*, listed in the second amended complaint. Plaintiffs cannot point to any evidence showing that they had developed a plan to manufacture and sell these chemicals in the United States in any quantity, much less quantities that constitute a "substantial effect" on domestic commerce.

The record is also undisputed that Plaintiffs' failure to pursue these manufacturing opportunities had nothing to do with Defendants actions. In fact, Shroff testified that the Angus Defendants had done nothing that would have an affect on whether the Indian Plaintiffs' made these chemicals. Shroff Dep. 857-63; *see also id.* at 863 (between 1992 and 1999, the Indian Plaintiffs introduced "20 new products, and ... are selling quite a lot in USA" without the Angus Defendants making "any attempt to interfere"). Clearly, Plaintiffs' decision to proceed with the manufacturing of these chemicals is based on their own business judgment. Therefore, Defendants' conduct had no effect on commerce, much less a "direct, substantial, and reasonably foreseeable" effect sufficient to give rise to a Sherman Act claim. *See McElderry*, 678 F.Supp. at 1078 ("speculative" domestic effects insufficient under FTAIA).

E. JCM's Alleged Injuries

Plaintiffs assert that Plaintiff JCM sustained injury as a result of Defendants' antitrust conduct. Defendants avow, however, that the FTAIA does not give the court jurisdiction over JCM's claims on the basis of alleged domestic injuries.

1. The Indian Plaintiffs May Not "Piggy-Back" On JCM's Claims.

In this case, the record demonstrates that the Indian Plaintiffs would have only been injured abroad. First, JCM

was not a competitor or a consumer in the nitroparaffins and nitroparaffin derivatives markets which Plaintiffs allege Defendants have monopolized in violation of the Sherman Act. JCM's involvement was as one of two joint venturers in Miller-Deltachem that was allegedly going to sell technology to the Indian Plaintiffs so that they could manufacture chemicals. The contracts between Miller-Deltachem and the Indian Plaintiffs prevented Miller-Deltachem and JCM from using Miller-Deltachem's technology to manufacture the chemicals themselves. *See* AB Technology Sales Agreement ¶ 4.2 (DX 49) ("The Process Technology Package ... shall be and remain the property of SUCL."); *id.* ¶ 4.5 ("All Process Technology ... shall be the sole and exclusive property of SUCL ... MDV will not sell any AB Process Technology to any third party."); 1-NP Technology Sales Agreement ¶¶ 4.2, 4.5 (DX 48) (same with respect to 1-NP). Furthermore, the alleged injury to JCM and Miller-Deltachem is that they did not receive payments that they would have earned for providing technology to the Indian Plaintiffs.

Under the FTAIA, when the court's jurisdiction over a Sherman Act claims rests on a claimed "effect ... on *export* trade or export commerce ... of a person engaged in such trade or commerce in the United States," the Sherman Act "shall apply to such conduct *only for injury to export business in the United States*," 15 U.S.C. § 6a (emphasis added). In other words, "a foreign company cannot demonstrate the domestic injury requirement by 'piggy-backing' onto the injury of a United States exporter." *Optimum*, 926 F.Supp. at 532 (internal quotations omitted). The *Optimum* court thus held that an Argentine firm alleging anticompetitive conduct in an Argentine market "cannot maintain an action under the Sherman Act based merely upon injury to United States exporters attempting to enter the Argentine ... market." *Id.* at 533. Similarly, in *The 'In' Porters*, the court dismissed a suit brought by a

French clothing distributor alleging that the defendants' anticompetitive conduct had caused it to "terminate[] its relationship with a number of United States clothing exporters." *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494, 499-500 (M.D.N.C.1987). This court, therefore, concludes that the Indian Plaintiffs cannot establish FTAIA jurisdiction over JCM's claimed export-related injuries because the FTAIA "requires an actual injury to plaintiff within the United States." *Id.* at 500.

2. The Alleged Effects On JCM Could Not "Give Rise" To A Sherman Act Claim.

Defendants allege that Plaintiffs have shown no effect on domestic sales of AB, 1-NP, or any other chemical, and there is no allegation that JCM suffered any domestic injury in the market. To the contrary, JCM's alleged injuries stem from business that Miller-Deltachem allegedly lost as a supplier of technology to chemical manufacturers and as an industry consultant. As the record shows any alleged domestic effects on JCM caused by Defendants' misconduct could not "give[] rise to a claim under the provisions of" the Sherman Act.

The record demonstrates that the effects of Defendants alleged conduct is insufficient to establish an antitrust claim. First, the only markets in which Plaintiffs accuse Defendants of committing monopolization offenses are markets for nitroparaffins and nitroparaffin derivatives. Defendants are not participants in any market for chemical industry consulting services, and Plaintiffs do not allege antitrust violations in any such market.

Second, the record contains no evidence concerning competitive conditions in the market for chemical industry consulting services, and there is no reason to believe that Miller-Deltachem's alleged injuries as a supplier of such services could reflect any injury to competition in that market, rather than simply injury to Miller-Deltachem

itself. Moreover, Plaintiffs' liability expert Dr. Leffler has no opinion "as to how competition has been affected" by Miller-Deltachem leaving the market altogether. Leffler Dep. 502. "It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993); *see also, e.g., Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir.1991) (because "the main purpose of the antitrust laws is to preserve and promote competition[,] ... [w]hether or not a practice violates the antitrust laws is determined by its effect on competition and not its effect on an individual competitor"). Accordingly, the FTAIA requires Plaintiffs to prove "antitrust injury to the market or to competition in general, not merely injury to individuals or individual firms." *McGlinchy*, 845 F.2d at 815.

This court finds that when, as here, antitrust plaintiffs can show at most "injury to themselves, rather than to the relevant market," they have failed to show "the requisite domestic anticompetitive effect," and their claims fail under the FTAIA. *Id.*; *see also McElderry*, 678 F.Supp. at 1077-78 (plaintiff cannot overcome FTAIA with an "allegation of mere monetary injury," since a "Sherman Act plaintiff must 'show injury to a market or to competition in general, not merely injury to individuals'"). Here, Plaintiffs have not shown the requisite domestic anticompetitive effect regarding JCM's unsupported claims of domestic injury. Clearly, the lack of any "direct, substantial, and reasonably foreseeable" domestic effect sufficient to give rise to a Sherman Act claim bars Plaintiffs' antitrust claims.

F. The Cook County Action

Plaintiffs contend that Defendants' (Angus) amended complaint filed in the Cook County Action operates as an "admission" on the impact on domestic commerce issue. *See* Pls. DC Br. 16-17. Defendants, however, state that

Plaintiffs' assertion is erroneous and merely an improper attempt to relieve Plaintiffs of their burden of establishing that Defendants' conduct had a "direct, substantial, and reasonably foreseeable effect" on domestic commerce.

Plaintiffs' "admission" contention cannot prevail. As Plaintiffs' own citations recognize, a pleading from a different action is "not a judicial admission, and thus not binding or conclusive." *Enquip, Inc. v. Smith-McDonald Corp.*, 655 F.2d 115, 118 (7th Cir.1981); *see also Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 364 (7th Cir.1990) (doubting that doctrine of "men the hold" has any force other than to "bar a contract party from changing his position in [the same] litigation" and declining "to determine ... whether it applies outside the contract area") (cited as Pls. DC Br. 16-17).

Furthermore, even assuming the admissibility of the Cook County pleading for some purpose(s), it does not show that Plaintiffs must prove that they intended to and were prepared to sell AB, 1-NP, bronopol, tris amino and AMP in the United States. At most, Angus's amended complaint shows that Angus believed their trade secrets were at risk because Plaintiffs intended to use those secrets to manufacture these chemicals abroad.[4] Furthermore, with respect to the principal products at issue in the Cook County action, Angus believed and still believes that Plaintiffs intended to use Angus's trade secrets to manufacture AB in India for sale in India and to manufacture 1-NP for use in manufacturing AB in India. Furthermore, the Cook County amended complaint

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[4] Additionally, following further discovery in the Cook County action, Angus filed a second amended complaint (Reply Ex. JJ) *withdrawing* its claims regarding bronopol, tris amino, and AMP. *See Harbor Ins.*, 922 F.2d at 364-65 (cited by Plaintiffs at Pls. DC Br. 17) ("if pretrial discovery or other sources of new information justify a change in a contract party's litigating position," the change could not, under any circumstances, "be deemed a forbidden attempt to 'mend the hold'").

contains no allegations about sales of any chemicals in this country.

As demonstrated by the record, it is clear that Plaintiffs never had any significant plan to make AB, 1-NP, bronopol, tris amino, or AMP for sale in the United States. And the subject Cook County pleading contains no suggestion to the contrary.

G. Plaintiffs' FTAIA/Nonjurisdictional Contention

Plaintiffs allege that the FTAIA presents a question of substantive law rather than an issue of jurisdiction. Plaintiffs thus assert that their antitrust claims should go to a jury because there are disputed issues of fact concerning the FTAIA and that a reasonable jury could conclude that their claims satisfy the FTAIA. Defendants, however, correctly point out that satisfaction of the FTAIA's requirements is a matter of subject matter jurisdiction. Accordingly, the FTAIA's threshold subject matter jurisdiction issue must first be addressed by the court at this time, not by a jury at trial.

At its essence, the FTAIA concerns the very power of the Court to hear and decide antitrust claims. Case law, and other authorities, uniformly agree that the FTAIA limits the "jurisdiction" of American courts over antitrust claims involving foreign commerce.[5] Stated differently, legal

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[5] *See, e.g., Filetech S.A. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir.1988) ("FTAIA forbids the exercise of jurisdiction over [certain] Sherman Act violations"); *Caribbean Broadcasting Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085 (D.C. Cir.1998) ("a court has subject matter jurisdiction only to the extent that" the FTAIA is satisfied); *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1544 (9th Cir.1994) (applying FTAIA standard to claim under the Bank Holding Company Act and holding that the plaintiffs' "failure to establish any anticompetitive domestic effect was jurisdictional"); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 813 (9th Cir.1988) (FTAIA "precluded subject matter jurisdiction"); *Filetech S.A. v. France Telecom S.A.*, 1999 WL 92517, at *1 (S.D.N.Y.1999) ("Within the context of the Sherman Act and the FTAIA, to establish jurisdiction defendant's conduct complained of must" satisfy

authorities are consistent in describing the FTAIA issue presented here as one of subject matter jurisdiction.[6]

As the District Judge stated in his prior opinion in this case, "Congress ... passed the FTAIA to amend the Sherman Act so that jurisdiction over foreign commercial conduct would not be exercised unless such conduct had a 'direct, substantial, and reasonably foreseeable effect' on United States commerce." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 1994 WL 577246, at *7, (N.D.Ill. Oct. 18, 1994) (emphasis added). The legislative history also compels the same conclusion: it was Congress's "intent ... to address only ... *subject matter jurisdiction*" in passing the FTAIA,

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the FTAIA); *S. Megga Telecoms. Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413, at *9 (D.Del.1997) ("plaintiffs fail[ed] to establish subject matter jurisdiction under the FTAIA"); *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498, at *1 (N.D.Cal.1997) ("Under the FTAIA, courts only have jurisdiction over 'conduct involving trade or commerce ... with foreign nations' if that conduct" satisfies the FTAIA); *Optimum, S.A. v. Legent Corp.*, 926 F.Supp. 530, 533 (W.D.Pa.1996) (dismissing antitrust claims "for lack of subject matter jurisdiction" under FTAIA); *McElderry v. Cathay Pacific Airways Ltd.*, 678 F.Supp. 1071, 1077 (S.D.N.Y.1988) ("Under the [FTAIA], federal courts do not have jurisdiction" over claims that do not meet its standards); *Papst Motoren GmbH v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F.Supp. 864, 869 (S.D.N.Y.1986) (granting "motion to dismiss for lack of subject matter jurisdiction" under FTAIA); *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F.Supp. 920, 925 (E.D.N.Y.1985) (claims lacked the "jurisdictional nexus" required by FTAIA); *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494, 499 (M.D.N.C.1987) (FTAIA "establishes three requirements that an antitrust plaintiff ... must prove to establish subject matter jurisdiction"); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102, 1107 (S.D.N.Y.1984) (granting "motion to dismiss for lack of subject matter jurisdiction" under FTAIA). *See also In re Copper Antitrust Litig.*, 117 F.Supp.2d 875 (W.D.Wis.2000).

[6] Plaintiffs' supplemental citation of *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358 (2nd Cir. 2000), respectfully, is of no aid to Plaintiffs. As is pertinent here, that case merely recites general, generic principles regarding the analytical approach as to whether an issue affects subject matter jurisdiction or the merits. And, factually, *Da Silva*, is a Title VII not an antitrust case.

which "does not affect the legal standards for determining whether conduct violates the antitrust laws." H.R.Rep. No. 686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code Cong. & Ad. News 2487 (emphasis added).

The FTAIA, therefore, clearly presents a jurisdictional question that must be resolved by a court before a case may proceed to a determination regarding its merits. In *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), the Supreme Court explained that "'[w]ithout jurisdiction the court cannot proceed at all in any cause.' ... The requirement that jurisdiction be established as a threshold matter ... is 'inflexible and without exception.'" *See also Okoro v. Bohman*, 164 F.3d 1059, 1061 (7th Cir.1999) ("jurisdictional issues should be addressed first and if they are resolved against jurisdiction the case is at an end and there is no occasion to address the merits"); *Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir.1998) ("a federal court must assure itself that it possesses jurisdiction over the subject matter ... before it can proceed to take any action respecting the merits.")

Plaintiffs have not cited any real authority to support their claim that the FTAIA "presents a question of substantive law."[7] In fact, Plaintiffs' argument in support of

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[7] Plaintiffs' citation to *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993), is misplaced. In explaining that the district court there "undoubtedly had *jurisdiction*," the Court included a footnote describing the FTAIA and noted that "the conduct alleged plainly meets [the FTAIA's] requirements." *Hartford Fire*, 509 U.S. at 795-96, n. 23, 113 S.Ct. 2891 (emphasis added). The Supreme Court's reference to the FTAIA in its explanation that subject matter jurisdiction was uncontested firmly established that the FTAIA sets forth standards governing the jurisdiction of American courts over foreign antitrust actions. Like *every* other relevant authority, *Hartford Fire* demonstrates that the FTAIA is jurisdictional.

On a different *Hartford Fire* issue raised by Plaintiffs: Plaintiffs also claim that, under *Hartford Fire*, they need only show a "substantial effect

their unprecedented position is to note that the FTAIA does not contain the word "jurisdiction." Plaintiffs further contention that a "reasonable jury could conclude" that their claims satisfy the FTAIA is unavailing because "[t]he court must decide whether jurisdiction exists, not whether there is sufficient evidence to have a trial on the jurisdictional issues." *In re W.L.*, 1999 WL 33878, at *2 n. 2 (N.D.Ill. Jan. 19, 1999). Moreover, "disputes over material facts will not preclude the district court from determining the jurisdictional issue." *Lumpkin v. United States*, 791 F.Supp. 747, 749 (N.D.Ill.1992). Therefore, questions of jurisdiction must be determined by the court and not by a jury (*see, e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537-38, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995)), and "no case can properly go to trial if the court is not satisfied that it has jurisdiction." *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir.1986).

This court finds that given the case law and legislative history that it is clear that the FTAIA is a matter of subject matter jurisdiction that limits the jurisdiction of American courts over antitrust claims involving foreign commerce. Thus, any disputed facts regarding the court's subject matter jurisdiction must be resolved by the court at this time. *See Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir.1998) (district court erred in failing to resolve factual disputes concerning jurisdiction under the FTAIA before reaching other issues).[8]

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in the United States" to pursue their antitrust claims, and not the "direct, substantial and reasonably foreseeable effect" required by the FTAIA. But as noted above, even *arguendo* if the *Hartford* standard is applied, for all the same reasons that the undisputed record shows no "direct, substantial, and reasonably foreseeable effect" on domestic commerce under the FTAIA, the record shows no "substantial effect" on domestic commerce under the test proposed.

[8] Relevantly, *see also* citation and quotation at Footnote 1 herein, p. 1008, *supra*.

II. FTAIA Applicability

Plaintiffs argue that the FTAIA is not applicable in this case because they would have been involved in exporting chemicals from India into the United States but for the alleged antitrust violations. Pls. DC Br. 35-37. Defendants counter that Plaintiffs' argument is both incorrect and irrelevant.

In asserting their theory, Plaintiffs rely on the FTAIA's introductory language, which states that the FTAIA's requirement of a "direct, substantial, and reasonably foreseeable effect" on domestic commerce applies to claims "involving trade or commerce (other than import trade or import commerce) with foreign nations." 15 U.S.C. § 6a. Based on this language, Plaintiffs assert that the parenthetical exclusion of "import trade or import commerce" means that a foreign antitrust claim need never satisfy the FTAIA as long as it involves products that might be shipped to the United States. It is therefore, Plaintiffs' contention that if a foreign antitrust plaintiff merely alleges that it would have exported goods to the United States, then the FTAIA requirement would not apply.

The court determines that Plaintiffs' position is not a correct statement of the law. The "main significance" of the FTAIA is to "make[] clear that the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers"—a concern that is "triggered by direct, substantial, and reasonably foreseeable effects on United States commerce, not by any minor impact." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272h2, at 362-63 (1997) (emphasis in original); *see also The 'In' Porters, S.A.*, 663 F.Supp. at 499. The antitrust laws' goal of protecting American consumers and producers cannot realistically be served by Plaintiffs' version of the FTAIA, which would permit foreign plaintiffs to bring treble damages suits based on conduct that has only

indirect, insubstantial, and unforeseeable effects on commerce in this country.

Accordingly, Plaintiffs' theory has been consistently rejected by the courts, which have recognized that "the 'import trade or import commerce' exception to the FTAIA applies *only to domestic importers*." *S. Megga Telecomms. Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413, at *8 n. 22 (D.Del.1997) (Reply Ex. AAA) (emphasis added); *accord Coors Brewing Co. v. Miller Brewing Co.*, 889 F.Supp. 1394, 1398 (D.Colo.1995) (FTAIA applies to antitrust claims involving foreign markets "with the exception of claims brought by *domestic importers*") (emphasis added); *The 'In' Porters*, 663 F.Supp. at 499 (FTAIA "establishes ... requirements that an antitrust plaintiff, other than a *domestic importer*, must prove to establish subject matter jurisdiction) (emphasis added); *see also Papst Motoren GmbH*, 629 F.Supp. at 869 (FTAIA required dismissal of antitrust claims alleging restraints abroad claimed to affect products shipped to the United States). These courts have, thus, held that the FTAIA exempts those claims that involve the business of United States firms that import goods into the United States and not all claims involving the export of goods to the United States from abroad or all claims involving goods may eventually be shipped to the United States.[9]

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[9] The legislative history that Plaintiffs cite is not inconsistent with all this case law. The legislative history does not describe the FTAIA as exempting from its coverage all claims involving goods shipped to the United States, but only claims involving import transactions (*see* Pls. DC Br. 36-37)-i.e., the business of domestic firms importing goods into the United States.

The only case that even remotely supports Plaintiffs' position is *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F.Supp. 81 (S.D.N.Y.1995). However, more recent decisions have declined to follow its flawed analysis, which conflicts with the great weight of authority. *See S. Megga*, 1997 WL 86413, at *8 n. 22. Plaintiffs' additional citations of *Hartford Fire* and *Eurim-Pharm* do not assist them. *See* Pls. DC Br. 37.

Plaintiffs' theory is further belied by the language of the FTAIA because one way in which a plaintiff can show the requisite "direct, substantial, and reasonably foreseeable effect" on domestic commerce is by showing such an effect on "import trade or import commerce with foreign nations." 15 U.S.C. § 6a(1)(A). If Plaintiffs' theory were correct, this would mean that all import-related antitrust claims would be immune from the FTAIA and such a statutory interpretation is not permissible. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (statutes "must, if possible, be construed in such fashion that every word has some operative effect"); *United States v. Ranum*, 96 F.3d 1020, 1030 (7th Cir.1996). Furthermore, a leading treatise explains, while the FTAIA's language may be "cumbersome and inelegant," it plainly "means that the antitrust laws do not apply to domestic or foreign commerce affecting foreign markets, consumers or producers unless there is a direct, substantial, and reasonably foreseeable effect on the *domestic* market." Phillip Areeda & Herbert Hovemkamp, *Antitrust Law* ¶ 272h2 (1997) (emphasis in original).

In short, the court finds that the FTAIA is applicable to the case herein.

Hartford Fire said nothing at all about the exception for import transactions. *Eurim-Pharm* also did not address the issue and, in any event, the *dicta* quoted by Plaintiffs refers, like the legislative history, only to "import transactions," which limits the exception's scope to claims brought by domestic importers. *See Eurim-Pharm*, 593 F.Supp. at 1106.

CONCLUSION[10]

In view of the foregoing, Defendants' motion to dismiss Counts I and II of the second amended complaint for lack of subject matter jurisdiction is granted.[11]

Too, because the court does not have original subject matter jurisdiction over Plaintiffs' federal claim(s), the court has no (and thus declines to exercise) supplemental jurisdiction over Plaintiffs' state law tortious interference claim (Count III). 28 U.S.C. § 1367(a); *Pinney Dock and Transp. Co. v. Penn. Cent. Corp.*, 196 F.3d 617, 621 (6th Cir.1999); *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 361 (2nd Cir.2000); *In re Copper Antitrust Litigation*, 117 F.Supp.2d 875, 877 (W.D.Wis.2000); *see Wellness Community Nat'l v. Wellness House*, 70 F.3d 46, 50 (7th Cir. 1995).

ENTER:
IAN H. LEVIN
United States Magistrate Judge

Dated: February 16, 2001

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[10] The court reviewed and considered all of the points raised by the Plaintiffs, including some that were found impracticable and unnecessary to be addressed herein. The court is mindful, too, that Plaintiffs also addressed the subject motion to dismiss issues in Plaintiffs' motion for partial summary judgment brief and reply. The court did review and consider all of Plaintiffs' arguments as to the subject motions to dismiss that were contained in the described partial summary judgment briefs of the Plaintiffs.

Also, the court has reviewed Plaintiffs' sur-reply memorandum in opposition and finds nothing therein that would impact on the count's motion decision here.

[11] In view of the court's ruling, it's unnecessary to consider the other motion argument(s) of the Defendants under Counts I and II of the second amended complaint.

TITLE 15. COMMERCE AND TRADE
CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * *

§ 6a. Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

§ 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however*, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

Supreme Court, U.S.
FILED
OCT - 8 2003
OFFICE OF THE CLERK

No. 03-203

In the Supreme Court of the United States

UNITED PHOSPHORUS, LTD., ET AL.,

Petitioners,

v.

ANGUS CHEMICAL COMPANY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit was correct in holding, in accord with all of the appellate courts that have addressed the issue, that the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, restricts the subject matter jurisdiction of the federal courts where the alleged anticompetitive conduct is without any "direct, substantial, and reasonably foreseeable" domestic effects and the only potential injuries incurred are by foreign plaintiffs in foreign markets.

RULES 29.6 AND 14.1 STATEMENT

Respondents are ANGUS Chemical Company, ANGUS Chemie GmbH, the Estate of Freeman Hughes, Ollie W. Chandler, Lowell Pals, Gary W. Granzow ("ANGUS Respondents"); Lupin Laboratories, Ltd. (n/k/a Lupin, Ltd.) and D.B. Gupta ("Lupin Respondents").

Respondents ANGUS Chemical Company and ANGUS Chemie GmbH make the following disclosure statement: (1) the Dow Chemical Company is the parent of CanStates Holdings, Inc., which is the parent of ANGUS Chemical Company, which is the parent of ANGUS Chemie GmbH; (2) the Dow Chemical Company owns the stock of CanStates Holdings, Inc., which owns the stock of ANGUS Chemical Company, which owns the stock of ANGUS Chemie GmbH.

Respondent Lupin Laboratories, Ltd. has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioners are United Phosphorus, Ltd., Shroff's United Chemicals, Ltd., and J.C. Miller & Associates, Inc.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

The court below held that the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, limits the subject matter jurisdiction of the federal courts and that a motion to dismiss based on Section 6a should therefore be decided by the district court pursuant to Federal Rule of Civil Procedure 12(b)(1). Although the petition tries mightily to obscure the fact, there is no conflict among the courts of appeals with respect to this question—"all [of the courts of appeals] have treated the issue as one of subject matter jurisdiction" (Pet. App. 13a). Not a single appellate court has adopted the construction of Section 6a advanced by petitioners.

The federal government interprets Section 6a in the same way as the lower courts. It has consistently stated that Section 6a restricts the subject matter jurisdiction of the federal courts.

Moreover, the question presented by petitioners makes no difference to the outcome of this case. The court below noted respondents' contention that "[respondents] should win" whether Section 6a is interpreted to limit the courts' subject matter jurisdiction or to establish an additional element for foreign antitrust claims, stating that it was "a proposition on which we need pass no judgment." Pet. App. 6a. But it is clear from the district court's opinion that the court did not have to engage in the weighing of evidence to rule against petitioners—the district court repeatedly determined that there was "no evidence" supporting petitioners' position. Accordingly, petitioners' claims would have been rejected even under their view that the motion in this case should have been decided under summary judgment standards, rather than the Rule 12 standards that apply to questions of subject matter jurisdiction.

Faced with these insuperable obstacles to obtaining review by this Court, petitioners seek to muddy the waters in a variety of ways. First, they assert that this case provides an

opportunity for the Court to decide whether the "affecting commerce" requirement of Section 1 of the Sherman Act is a limitation on the federal courts' subject matter jurisdiction. But this case presents no question regarding Section 1 and the court below did not construe Section 1—the issue here relates solely to the FTAIA. Accordingly, the case presents no occasion to decide issues relating to Section 1.

Next, petitioners argue that review is appropriate because the decision below supposedly conflicts with this Court's decisions holding that other statutes with different statutory language, enacted in a different statutory context, do not limit federal courts' subject matter jurisdiction. Yet the Court has recognized repeatedly that this issue turns upon each particular statutory context. That is precisely the analysis that the court below utilized here.

Finally, petitioners assert that the Court should grant review in order to provide guidance to the lower courts in determining whether a statute restricts subject matter jurisdiction. But this Court does not provide abstract guidance; it addresses important legal issues on which the lower courts are divided. And it is difficult to understand why such guidance is needed in view of the unanimity among the courts of appeals with respect to the construction of the FTAIA.

Petitioners have thus failed to present any reason why review by this court is warranted here. The petition for a writ of certiorari should be denied.

STATEMENT

This case involves the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, a law enacted by Congress in 1982 to address concerns about the extra-territorial reach of the antitrust laws. The FTAIA provides in pertinent part that the federal antitrust laws "shall not apply to conduct involving trade or commerce * * * with foreign

nations unless" that conduct "has a direct, substantial, and reasonably foreseeable effect" on commerce within the United States. *Id.* § 6a(1)(A).

Congress in 1982 feared that U.S. companies were not engaging in international trade to the same extent as companies from other nations, possibly because concerns about antitrust liability prevented U.S. companies from collaborating in the international marketplace. The FTAIA was designed to eliminate that uncertainty by establishing a clear "jurisdictional threshold" for application of the antitrust laws. Sen. Conf. Rep. No. 97-644, at 30 (1982); see also H.R. Rep. No. 97-686, at 2-3, 5-6, 9 (1982). The House Committee explained that the "domestic 'effect' [standard would] serve as the predicate for antitrust jurisdiction," with a "court" deciding in the first instance if those "requirements for subject matter jurisdiction are met." H.R. Rep. No. 97-686, at 11, 13.

Petitioners, the plaintiffs in this antitrust action, claim that their plans to manufacture certain chemicals in India were disrupted by a state court lawsuit filed by respondent ANGUS Chemical Co.; petitioners alleged that the filing of that lawsuit violated Section 2 of the Sherman Act, 15 U.S.C. § 2. Several respondents moved to dismiss for lack of subject matter jurisdiction, asserting that the complaint failed to allege the "direct, substantial, and reasonably foreseeable" effect on United States commerce required by the FTAIA. The district court denied the motion, finding that the allegations of the complaint were sufficient, but the court warned petitioners that they would need "much more" to withstand a renewed motion to dismiss that controverted the complaint's allegations. *United Phosphorus, Ltd.* v. *ANGUS Chemical Co.*, 1994 U.S. Dist. LEXIS 14786, at *35 (N.D. Ill. Oct. 13, 1994).

Following four and one-half years of discovery, respondents filed a renewed motion on the ground that the evidence

adduced during discovery established that petitioners could not satisfy the FTAIA standard. Based upon its review of thousands of pages of evidentiary materials, the district court found that the undisputed evidence—including petitioners' own admissions—established that the alleged anticompetitive conduct "had no effect on any United States commerce" and that the court therefore lacked subject matter jurisdiction over the case. Pet. App. 49a. The en banc court of appeals affirmed.

Unfortunately, the statement of the case in the petition contains numerous conclusory assertions that have no support in the decisions below or in the evidentiary record. For example, petitioners state as a fact that they planned to manufacture chemicals in India "for sale worldwide" (Pet. 1), but that assertion was rejected by both courts below. Accordingly, we have set forth a more complete discussion of the facts demonstrating the lack of any evidence of an effect on United States commerce.

A. The Antitrust Claim

This case concerns Amino-1 Butanol ("AB"), a substance used in the manufacture of ethambutol—one of the primary drugs for treating tuberculosis—and 1-nitropropane ("1-NP"), which is used in the manufacture of AB. Respondent ANGUS Chemical Company ("Angus") was the world's only manufacturer of 1-NP during much of the 1991-1994 time period at issue in this case. Angus's German subsidiary, respondent ANGUS Chemie GmbH ("Chemie") was the world's only manufacturer of AB. India has the highest incidence of tuberculosis in the world, and a number of companies located in India (including respondent Lupin Laboratories, Ltd.) purchased AB from Chemie to make ethambutol.

In the early 1990s, two Indian chemical companies, United Phosphorus, Ltd. and Shroff's United Chemicals, Ltd.

("the Indian petitioners") planned to acquire the technology for making 1-NP and AB from Dr. John Miller, the owner of petitioner J.C. Miller & Associates, Inc. As the former Vice President of Research and Development at Angus, Miller "supervised Angus's propriet[ar]y efforts to improve its AB processes" and had unlimited access to the company's detailed manufacturing procedures. The Indian petitioners' principal, Rajju Shroff, tried to conceal Miller's involvement in the project—for example, falsely declaring in an application to the Indian government that the AB technology would be obtained from another scientist. Pet. App. 3a, 44a.

Once Angus learned that Miller would be supplying the technology to petitioners, Angus filed suit in Illinois state court to enjoin the misappropriation of its trade secrets. When faced with a discovery order that would have required disclosure of the very technology it sought to protect, Angus dismissed that lawsuit voluntarily. Pet. App. 3a, 45a.

Petitioners filed this antitrust action in 1994, claiming that but for the Illinois lawsuit, they would have sold AB, 1-NP, and other chemicals for profit. Pet. App. 3a-4a, 45a. The district court denied respondents' initial Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction under the FTAIA. Brought before any discovery, the motion was a facial challenge to the jurisdictional sufficiency of the complaint. Pet. App. 2a. At that stage, the court determined that the complaint's "broad, conclusory allegations" adequately asserted a domestic effect. "As the case proceeds," the court warned, petitioners would need "much more" to survive dismissal. *United Phosphorus*, 1994 U.S. Dist. LEXIS 14786, at *24, *35.

Following exhaustive discovery over a period of four and one-half years, respondents renewed their Rule 12(b)(1) motion to dismiss, this time relying on the evidence developed during discovery. Respondents moved in the alternative for summary judgment on the FTAIA issue (in the

event the district court determined that Rule 12 was inapplicable) and on other grounds.

B. Lack Of Any Evidence Showing An Effect On United States Commerce

The district court's opinion contains a detailed discussion of the evidence placed before it in connection with respondents' motion to dismiss or, in the alternative, for summary judgment. Petitioners say they "disagreed with virtually every [jurisdictional] fact" on which respondents relied (Pet. 4), but—other than a few broad and conclusory assertions—petitioners' discussion of the facts relates solely to tris amino and AMP, two chemicals that were at the periphery of the case in the district court. And, as we explain below, even that discussion is off the mark: petitioners' own employee testified that there had been no research and development efforts with respect to these substances. The district court correctly determined that petitioners failed to establish the requisite effect on United States commerce with respect to *each* of the chemicals at issue in this case.

Commerce in AB. The district court concluded that petitioners "have put forth no evidence tending to show that, but for the claimed antitrust violations, they would have sold AB domestically." Pet. App. 55a. Petitioners' exclusive focus on foreign sales is apparent from the entire history of their plans with respect to AB. The Indian petitioners admitted that they became interested in manufacturing AB when their consultant indicated it was a "good project for India," where 90-95% of the world's AB supply was purchased. *Id.* at 50a-51a. The record demonstrates that thereafter Shroff, Miller, and those working with them repeatedly discussed AB as a product for India. As their chemical broker stated, "'the market for it is in India with no U.S. business.'" Pet. App. 51a-52a; see Pet. App. 17a.

Other factors confirmed that petitioners' plans were confined to India and that they were not looking to sell AB in the United States. Petitioners admitted that they spoke only to potential customers located in India, and their proposed AB plant had an annual capacity precisely matching demand for the product in India. Pet. App. 52a-55a. Shroff and Miller both testified that they knew of no use for AB except in manufacturing ethambutol, which is not made in the United States. Pet. App. 52a-53a. The one company in the world with FDA approval to *sell* ethambutol in the U.S. at that time produced the drug in Italy with AB from India. Petitioners conceded they never spoke to anyone at that company "about the possibility of selling AB." Pet. App. 53a-57a.[1]

In sum, "[a]s [petitioners'] own liability expert agreed, 'any effect upon United States commerce, based on what [he has] seen with respect to AB sales' would be 'less than substantial.'" Pet. App. 55a. The district court accordingly found, based on these admissions, that petitioners "had no actual plans to sell AB in this country and that there would have been no significant AB sales opportunities for [petitioners] in this country even if they had tried to sell AB here." Pet. App. 54a-55a.

Commerce in 1-NP. Petitioners' "1-NP plans were limited to 1-NP production for [their] own use to make AB." Pet. App. 60a. Shroff testified that "[t]here's no market" for 1-NP other than for the manufacture of AB and that he intended to produce 1-NP "for our own requirements." *Ibid.* Therefore, Miller admitted, petitioners "never identified a single potential American consumer for 1-NP." *Ibid.*; see also *id.* at 61a (noting that petitioners' damages expert had

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[1] American laboratory supply houses do offer AB in small gram quantities. Petitioners had no "discussions with a single American supply house," which, regardless, would have resulted in only insignificant sales—and no "substantial effect" on U.S. commerce—due to the "tiny volumes" involved. Pet. App. 54a.

not opined that they were entitled to any damages for lost sales of 1-NP).

Indeed, "it is unclear whether [petitioners] would have manufactured 1-NP for their own use in the production of AB," because they had identified an alternative method of production that did not require 1-NP. Pet. App. 61a. Petitioners thus had not made even the most preliminary preparations for the new plant that would be needed to produce 1-NP. Pet. App. 60a-61a. As the district court found, petitioners never demonstrated they would have made 1-NP; they had no "firm plans" and ultimately settled on a manufacturing process for AB that did not require 1-NP. Pet. App. 61a-62a.

Commerce in Other Chemicals. Petitioners argued that because they were prevented from manufacturing 1-NP, they were also prevented from producing three other nitroparaffins—all byproducts of one method of making 1-NP. The record showed, based on admissions from Shroff and Miller, that "[i]f plaintiffs had manufactured 1-NP * * *, they would have done so using a [different] method that produces no other chemicals." Pet. App. 63a.

As for the three nitroparaffin derivatives that petitioners also claim they would have produced—bronopol, tris amino, and AMP—the Indian petitioners' head of research testified that petitioners had undertaken no "research and development efforts" with respect to tris amino and AMP and had never completed the "very preliminary report" of his lab work on bronopol. Pet. App. 65a. In addition, the Indian petitioners' decisions "about which products to pursue were made by a committee that kept written minutes" but "*no* documents were produced reflecting a plan to manufacture these chemicals." *Ibid.* (emphasis added).

The petition points to a statement by Miller "at the very outset of his relationship with" the Indian petitioners about

the potential market for sales of tris amino in the United States. Pet. 5. But the Indian petitioners' principal testified that the sole step the Indian petitioners took toward manufacturing the chemical was a "literature survey" which, Shroff conceded, failed to "identify a single use or potential buyer for [either] tris amino or AMP." Pet. App. 64a. Where a market for those products *might* exist is therefore irrelevant.[2]

In sum, as explained by the district court, petitioners "cannot point to *any* evidence showing that they had developed a plan to manufacture and sell" these other nitroparaffins, nitroparaffin derivatives, or any of the remaining chemicals listed in the complaint "in any quantity, much less quantities that constitute a 'substantial effect' on domestic commerce." Pet. App. 67a (emphasis added).

C. The District Court's Decision

In accordance with its detailed findings with respect to specific chemicals, the district court held that even if the allegations of anticompetitive conduct in bringing the Illinois suit were credited, the "undisputed" record demonstrated no domestic effect—because petitioners had focused entirely on the marketplace in India. Pet. App. 67a, 74a n.7. Petitioners "would have only been injured abroad," the court ruled, and defendants' conduct "can have had *no effect* on any United States commerce in the chemicals [petitioners] state they would have manufactured." Pet. App. 49a, 67a (emphasis

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[2] Petitioners rely (Pet. 5) on the complaint Angus filed in the Illinois action. Even if that complaint were somehow relevant after the full discovery in this case (and the district court concluded it was not (Pet. App. 70a-72a)), an allegation that Miller intended to manufacture tris amino and AMP—without stating where those chemicals would be manufactured or where they would be sold—does "not show [what petitioners] must prove"—"that they intended to and were prepared to sell [the chemicals] *in the United States*." Pet. App. 72a (emphasis added).

added). The record was "also undisputed" that it was petitioners' own business decisions, not anything respondents had done, that caused them to forego manufacturing opportunities. Pet. App. 67a. Petitioners admitted that they had decided to wait for *this* litigation to conclude before pursuing their plans to make the chemicals at issue. Pet. App. 59a, 65a.

Under the FTAIA, the court held, this "failure to establish any anticompetitive domestic effect [is] jurisdictional" and "requires dismissal of [petitioners'] antitrust claims." Pet. App. 49a, 67a. The court rejected petitioners' "unprecedented position" that the FTAIA establishes an additional substantive element for antitrust claims. Relying on "[c]ase law, and other authorities [that] uniformly agree that the FTAIA limits the 'jurisdiction' of American courts over antitrust claims involving foreign commerce," the district court saw the answer as "clear." Pet. App. 72a-75a. The district court therefore granted respondents' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Pet. App. 79a. In its judgment, the court alternatively granted respondents' motion for summary judgment on that same basis. C.A. App. A-25.[3]

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[3] Petitioners maintain (Pet. 6 n.8) that the district court did not grant respondents' Rule 56 motion because that ruling was not contained in its opinion. Pet. 6 n.8. This requires ignoring the court's judgment, as memorialized in its minute order. C.A. App. A-25. Moreover, as petitioners acknowledged in the court of appeals, the district court "did not expressly say * * * that it weighed the evidence." Pls. C.A. Br. 36. The reason the district court did not say so is that its factfinding depended on "undisputed" evidence and thus—any ambiguity as to the scope of its ruling aside—complied with the requirement that on summary judgment the evidence must be viewed in the light most favorable to the non-moving party. Pet. App. 67a (relying on petitioners' failure to "point to any evidence"); *id.* at 69a ("no evidence" to support petitioners' contention); *id.* at 75a n.7 (relying on "the undisputed record").

D. The *En Banc* Court of Appeals' Decision

The court of appeals heard the case *en banc* to address whether the FTAIA's requirement of a "direct, substantial, and reasonably foreseeable effect" on United States commerce "goes to the court's subject matter jurisdiction," or instead "states an additional element of a Sherman Act claim." Pet. App. 2a, 4a. The court of appeals affirmed the district court by a divided vote, holding that the FTAIA limits the subject matter jurisdiction of the federal courts.

The court of appeals carefully analyzed this Court's precedents, the unanimous view of the other courts of appeals on this question, the FTAIA's legislative history, the Justice Department's interpretation of the statute, the views of antitrust scholars, and relevant policy considerations. "[W]hile it might seem desirable," the court observed, "to have no messy extra jurisdictional requirements under some acts of Congress, but not others," it is clear that "Congress has the power to limit the jurisdiction of the federal courts." The court concluded that Congress in the FTAIA had restricted the courts' subject matter jurisdiction. Pet. App. 15a-17a.

Applying that standard to the present case, the court of appeals upheld the district court's determination that the requisite connection to United States commerce was not present. The court observed that the district court's analysis of the facts was "thorough" and that petitioners "do not tell us how [those] findings are clearly erroneous." Pet. App. 2a, 17a-18a.

The dissenting judges acknowledged that "several courts of appeals have decided dismissal motions based on the FTAIA under the rubric of 'subject matter jurisdiction,'" but nonetheless concluded that the Act's "effect on commerce test [was] an element of the plaintiffs' claim." Pet. App. 23a, 35a-36a.

REASONS FOR DENYING THE PETITION

The petition satisfies none of the criteria for a grant of certiorari. The decision below is correct and does not conflict with any decision of another court of appeals or with this Court's precedents. The Seventh Circuit's determination that the FTAIA limits the federal courts' subject matter jurisdiction, rather than adding a substantive element to a plaintiff's antitrust claim, is consistent with unanimous appellate authority on the issue and follows directly from the statutory text.

Petitioners' other arguments for certiorari are equally unavailing. First, because Congress's intent to circumscribe the federal courts' jurisdiction is so clearly expressed in the FTAIA, the ruling below adheres to, rather than deviates from, the standards applied by this Court to determine when a statute is jurisdictional.

Next, the purported conflict with respect to the "affecting commerce" element of Section 1 of the Sherman Act, 15 U.S.C. § 1, is irrelevant here. The court below construed the FTAIA, not Section 1. Granting review in this case would not bring before this Court any issue with respect to Section 1.

Finally, even if petitioners' interpretation of the FTAIA were adopted, they would still lose in this case. The district court's opinion makes clear that even under a summary judgment standard, the only possible conclusion is that petitioners cannot establish the requisite effect on United States commerce.

In sum, petitioners have presented no reason why the Court should grant review, and the petition accordingly should be denied.

A. Every Court Of Appeals To Consider The Question Has Held That The FTAIA's "Domestic Effects" Test Limits The Subject Matter Jurisdiction Of The Federal Courts.

All six of the other courts of appeals to address the issue have concluded—in accord with the decision below—that the FTAIA restricts the courts' authority to adjudicate the case. No appellate court has adopted petitioners' view of the statute. See *Filetech S.A.* v. *France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) (holding that "the FTAIA forbids the exercise of jurisdiction over Sherman Act violations" unless its conditions are met, and reversing the district court for failing to weigh evidence in accordance with Fed. R. Civ. P. 12(b)(1)); *Carpet Group Int'l* v. *Oriental Rug Imp. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000) ("the primary question presented is whether the District Court possessed subject matter jurisdiction over the plaintiffs' antitrust claims in light of the FTAIA"); *Den Norske Stats Oljeselskap AS* v. *HeereMac VOF*, 241 F.3d 420, 428 (5th Cir. 2001) ("the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs" when the statute's requirements not fulfilled); *McGlinchy* v. *Shell Chem. Co.*, 845 F.2d 802, 813 (9th Cir. 1988) (district court properly dismissed claim because the FTAIA "precluded subject matter jurisdiction"); *United States* v. *Anderson*, 326 F.3d 1319, 1329 (11th Cir. 2003) (the FTAIA restricts "American courts' jurisdiction"); *Caribbean Broad. Sys., Ltd.* v. *Cable & Wireless P.L.C.*, 148 F.3d 1080, 1085 (D.C. Cir. 1998) ("a court has subject matter jurisdiction only to the extent that" the FTAIA is satisfied).[4]

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[4] See also *Empagran S.A.* v. *F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 345 (D.C. Cir. 2003) (failure to satisfy FTAIA's provisions does not "authoriz[e] subject matter jurisdiction"); *Turicentro, S.A.* v. *American Airlines, Inc.*, 303 F.3d 293, 299-300, 305 (3d Cir. 2002) (subject matter jurisdiction was lacking where defendants' alleged conduct did not "affec[t] the domestic economy"); *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384, 389-390 (2d Cir. 2002) (using

Petitioners assert that these cases "may be 'drive-by jurisdictional rulings' [without] precedential effect." Pet. 24-25. Even if that assertion were correct, that would mean that the only decision to address the issue is the one in this case. And there would be no reason for this Court to grant review with respect to an issue that had been decided by only a single court of appeals.

But petitioners are wrong: the other courts of appeals have thoroughly considered the issue. For example, in *Filetech* and *HeereMac* the Second and Fifth Circuits reviewed the FTAIA's language and the prior case law as to the Act's jurisdictional scope, and assessed whether subject matter jurisdiction existed only after fully discussing Rule 12(b)(1) standards. *Filetech*, 157 F.3d at 931-932; *HeereMac*, 241 F.3d at 424-431. In fact, the *Filetech* court reversed precisely because the district court had failed to weigh jurisdictional facts. 157 F.3d at 932.[5] The court below correctly concluded that "[w]e simply cannot dismiss these cases as 'drive-by' jurisdictional rulings." Pet. App. 14a.

Given this unanimity among the courts of appeals, there is no reason for this Court to address the issue presented in the petition.[6]

12(b)(1) standards to review district court's dismissal of claims under FTAIA "for lack of subject matter jurisdiction").

[5] See also, *e.g.*, *McGlinchy*, 845 F.2d at 813-815; *Carpet Group*, 227 F.3d at 69-73; *Carribean Broad.*, 148 F.3d at 1085-1087.

[6] Petitioners assert (Pet. 25-27) that the Third and Fifth Circuits apply "special procedural rules" with respect to the jurisdictional inquiry under the FTAIA. They suggest that review is warranted here to consider an alleged conflict between those rules and the procedural approach used by other courts in determining whether the subject matter jurisdiction standard has been satisfied. But petitioners never argued for the application of these "special procedural rules" in the district court or in the court of appeals; they therefore cannot raise

B. No Question Regarding Section 1 Of The Sherman Act Is Presented In This Case.

Unable to establish a conflict among the courts of appeals with respect to the construction of the FTAIA, petitioners argue that certiorari should be granted here because of an alleged conflict concerning a separate statutory provision that was *not* the subject of the court of appeals' holding—Section 1 of the Sherman Act, 15 U.S.C. § 1. Petitioners assert (at 16) that there is "longstanding confusion" as to whether Section 1's requirement of proof of a sufficient effect on interstate commerce is jurisdictional, merits-based, or a combination of both, and urge the Court to grant certiorari in this case to resolve that issue.

The difficulty with petitioners' argument is that this case simply does not present that question: the issue decided by the courts below related solely to the FTAIA, not to Section 1 of the Sherman Act. In the course of its decision, the court of appeals did examine "domestic Sherman Act cases, which do not implicate FTAIA, but may shed some light by analogy" (Pet. App. 8a). But that brief discussion—in which the court itself emphasized that it was merely identifying a possible analogy—no more constitutes a holding with respect to Section 1 than the court of appeals' discussion (*id.* at 12a) of the federal criminal code provision relating to destruction by means of fire or explosives (18 U.S.C. § 844(i)) constitutes a holding with respect to that statute. There is no Section 1 issue in this case for the Court to review.

Nor can it be argued that the court of appeals' decision concerning the FTAIA is somehow controlling with respect

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that issue here. And petitioners do not even try to argue that these rules would make any difference in this case, where comprehensive discovery has been completed and the district court repeatedly found that petitioners had failed to present "any evidence" in support of their position.

to Section 1. The two provisions have completely different statutory language and different statutory contexts; and they were enacted at different times and have different purposes. Indeed, Congress made clear the limited scope of the FTAIA when it enacted the statute: "the effect of the legislation on current antitrust law" would be limited to removing "possible ambiguity" regarding the exercise of subject matter jurisdiction in extraterritorial disputes. H.R. Rep. No. 97-686, at 5, 13. The court of appeals relied upon concerns unique to the extraterritorial context in construing the FTAIA —concerns that are irrelevant to the interpretation of Section 1.

Indeed, petitioners' own argument confirms the absence of any necessary link between the FTAIA issue in this case and the construction of Section 1. Petitioners point out that the Second Circuit has held that the FTAIA limits subject matter jurisdiction, but that the "affecting commerce" language of Section 1 does not. The Fourth Circuit has adopted the same view. Pet. 27. If the two statutes were inextricably linked, these circuits could not have adopted these distinct interpretations of the two provisions.

For all of these reasons, there is no basis whatever for this Court to address the Section 1 issue in this case.

C. The Decision Below Is Entirely Consistent With This Court's Precedents Concerning Restrictions On Subject Matter Jurisdiction.

Petitioners also argue (at 10-16) that certiorari is warranted because the court of appeals' determination is inconsistent with this Court's precedents. That is simply wrong.

To begin with, the Seventh Circuit's ruling accords with this Court's decision in *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 795-796 & n.23 (1993), in which the Court addressed the FTAIA in the course of its discussion of

subject matter jurisdiction. Petitioners contend (at 23) that *Hartford Fire* needs "clarification," but the consensus in the courts of appeals shows that there is no confusion about this Court's decision.[7]

Moreover, the decision below is consistent with the standards that this Court applies in determining whether a statute circumscribes subject matter jurisdiction. The "starting point" for such inquiries is the "language of the statute itself." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987). The FTAIA provides that the antitrust laws "shall not apply" unless the activity complained of has a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, and such effect "gives rise" to an antitrust claim. 15 U.S.C. § 6a.

Courts consistently have construed "shall not apply" as jurisdiction-stripping language when it appears in statutes with extraterritorial reach.[8] Congress's use of this phrase in

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[7] *Hartford Fire*'s statement that some of the insurers had "concede[d]" jurisdiction is too thin a reed to support petitioners' claim of uncertainty. See Pet. 23-24. The Court itself determined that "the District Court undoubtedly had jurisdiction of these Sherman Act claims" (*Hartford Fire*, 509 U.S. at 795), as it had to do because subject matter jurisdiction may not be established by consent.

[8] See, *e.g.*, *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 664, 667 (7th Cir. 1998) (15 U.S.C. § 78dd(b)'s instruction that Securities Exchange Act "shall not apply" to securities transactions "without the jurisdiction of the United States" precludes federal courts from exercising jurisdiction absent substantially domestic material misconduct); *Fidenas AG* v. *Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 6, 8, 10 (2d Cir. 1979) (pursuant to § 78dd(b), court lacked "subject matter jurisdiction" over "predominantly foreign" Securities Exchange Act claim); *Mota* v. *University of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 524 (5th Cir. 2001) (42 U.S.C. § 2000e-1(a)'s direction that Title VII "shall not apply to an employer with respect to the employment of

the FTAIA thus establishes its intent to restrict the authority of federal courts.

It would be odd indeed to suppose that such plainly restrictive language simply refers to an element of an antitrust claim. That approach would permit a plaintiff to bring—perhaps even to trial—the very disputes the Act precludes because they lack a meaningful connection to U.S. interests.

Petitioners propose a mechanical rule (Pet. 11-12) under which the absence of the word "jurisdiction" in the Act would automatically foreclose a jurisdictional reading. This Court has never endorsed that approach, however. "Shall not apply" means what it says—if a plaintiff's complaint derives from conduct with purely foreign effects, the doors to the federal courthouse are shut. The term "jurisdiction" has no talismanic force; it is neither necessary nor sufficient to render a provision jurisdictional. "[N]othing is quite that simple," as the Seventh Circuit pointed out. Pet. App. 13a.

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aliens outside any State" means that "subject matter jurisdiction would not be present" in that circumstance).

"Shall not apply" is also routinely interpreted as jurisdictional in other types of statutes. See, *e.g.*, *New Jersey* v. *New York, S. & W.R. Co.*, 372 U.S. 1, 7 n.5 (1963) (provision that a statute "shall not apply" to certain railroad operation "eliminated the Interstate Commerce Commission's jurisdiction"); *Orsay* v. *United States Dep't of Justice*, 289 F.3d 1125, 1132-1136 (9th Cir. 2002) ("subject matter jurisdiction" was lacking under Federal Tort Claims Act provision stating that the statute "shall not apply" where claims involve discretionary function); *Shirley* v. *Maxicare Tex., Inc.*, 921 F.2d 565, 567 (5th Cir. 1991) (29 U.S.C. § 1003(b) deprives the court of "subject matter jurisdiction" by providing that ERISA "shall not apply" to certain benefit plans); *Coleman* v. *United States Bureau of Indian Affairs*, 715 F.2d 1156, 1163-1164 (7th Cir. 1983) (where provision indicated that allotment statute "shall not apply" to certain Indian tribal lands, it was "interpreted to exclude jurisdiction").

See, *e.g.*, *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (refusing to treat provision as limiting subject matter jurisdiction merely because it contained the term "jurisdiction").

The background and legislative history of the FTAIA confirm this reading of the statute. The FTAIA grew out of concern that American firms had begun to lag behind in international trade because of uncertainty regarding the application of the antitrust laws:

> Congress wanted to make clear a very simple proposition—U.S. firms can engage in anticompetitive conduct that injures foreign markets and foreign buyers. We do not care because either it is good for us, it is none of our business, or at a minimum it is somebody else's business.

Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 Loy. Consumer L. Rev. 523, 529 (2002).

The House committee report specifically stated that the FTAIA was to be a "jurisdictional test," applied "at the jurisdictional stage" of a case, intended to "exempt [specified conduct] from the antitrust laws." H.R. Rep. No. 97-686, at 9, 10. The "domestic 'effect' [would] serve as the predicate for antitrust jurisdiction," with a "court" deciding in the first instance if those "requirements for subject matter jurisdiction are met." *Id.* at 11, 13.

Petitioners' assertion (at 15 n.12) that the House Report is "obviously" referring to "the substantive scope of the antitrust laws" is flatly at odds with these passages. The portion of the report cited by the Seventh Circuit is conclusive:

> [The FTAIA] only establishes the standards necessary for assertion of United States antitrust jurisdiction. The

> substantive antitrust issues on the merits of the plaintiffs' claim would remain unchanged.

H.R. Rep. No. 97-686, at 11. The consistent message of the congressional reports, which is amply supported by the statutory text, is that the FTAIA concerns "subject matter jurisdiction," and not "the legal standards for determining whether conduct violates the antitrust laws." *Id.* at 13.

Moreover, the federal agencies charged with antitrust enforcement have interpreted the statute as restricting subject matter jurisdiction. The 1995 Antitrust Enforcement Guidelines for International Operations issued by the Department of Justice and Federal Trade Commission identify the FTAIA as supplying one of "the principal tests for subject matter jurisdiction in foreign commerce cases." ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 (1995). And the government has expressed the same view in a brief filed in this Court. See Brief for the U.S. and FTC as Amici Curiae at 11, *Statoil ASA* v. *HeereMac VOF*, No. 00-1842 (U.S. Jan. 2002) (the FTAIA "confers subject matter jurisdiction" over a claim that arises from "anticompetitive effects on domestic commerce").[9]

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[9] This Court denied review in that case. See 534 U.S. 1127 (2002).

In *HeereMac*, there was no dispute that the effect on United States commerce required by the first prong of the FTAIA (Section 6a(1)) had been established; the case involved the question whether the second prong of the FTAIA (Section 6a(2)) allows subject matter jurisdiction when the particular plaintiff has not suffered injury in the United States market and has only been injured abroad. See 241 F.3d 420. That issue is not implicated in this case because petitioners' failed to meet the threshold requirement of Section 6a: the alleged anticompetitive conduct here had *no effect at all* on U.S. commerce. The separate question addressed in *HeereMac* regarding the *second* prong of the FTAIA is one on which the courts of appeals are now deeply divided. See, *e.g.*, *Empagran S.A.* v. *F. Hoffman-LaRoche*,

Antitrust scholars also have concluded that the FTAIA establishes a jurisdictional bar to suit. Professors Areeda and Hovenkamp describe the statute as a source of "jurisdictional rules" separate from the merits: "once the effects specified [in the FTAIA] are shown to exist, a plaintiff will then be allowed to prove, if it can, that the defendant's conduct violates the legal standards of Sherman Act §§ 1-2." 1A Areeda & Hovenkamp, ANTITRUST LAW ¶ 272h, at 360, ¶ 273c4, at 389 (2d ed. 2000). "[M]otions to dismiss for lack of requisite effects," their treatise adds, are "addressed under the standards of FRCP 12(b)(1)." *Id.* ¶ 273c4, at 43 (Supp. 2003).[10]

Finally, principles of sound judicial administration also weigh strongly in favor of the court of appeals' interpretation. Disposing of lawsuits with no substantial connection to the United States early in a case—as the jurisdictional approach allows—keeps cases involving entirely foreign conduct from being embroiled in unnecessary and burdensome litigation in our courts.

Construing the FTAIA as establishing an element of a claim means that cases with only remote and tangential connections to the United States would be left to linger in our

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Ltd., 315 F.3d 338, 341 (D.C. Cir. 2003) (acknowledging conflict). A petition for rehearing in *Empagran* was denied on September 11, 2003.

[10] See also, *e.g.*, 2 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 1116 (5th ed. 2002) (FTAIA lays out "jurisdictional prerequisites"); Bruce & Peirce, *Understanding the Export Trading Company Act and Using (Or Avoiding) Its Antitrust Exemptions*, 38 BUS. LAW. 975, 983 (1983) (FTAIA "restricts the jurisdictional reach of the Sherman [Act]"); Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 809-810 (1986) (FTAIA "merely sets forth [a] threshold subject matter jurisdictional test").

courts. Any factual inquiry into "domestic effects" would be delayed until summary judgment and—if questions of fact remained—until jurors reached a verdict. Plaintiffs could extract costly settlements based on purely foreign conduct due to the *in terrorem* effect of the treble damage penalty and the enormous expense associated with antitrust litigation, effectively evading the Act's U.S. commerce requirements. See Posner, ANTITRUST LAW 275 (2d ed. 2001) (discussing "extortion problem" posed by immense damage awards in private antitrust actions).

Congress never intended our legal system to provide such "remedies." The judiciary's already congested dockets should not be further crowded by imported controversies such as petitioners' that have no relevance to our economy or to the enforcement of our laws. See *Hartford Fire*, 509 U.S. at 796 n.23 ("FTAIA was intended to exempt from the Sherman Act export transactions that [do] not injure the United States economy").

Petitioners ignore these considerations. They speculate (Pet. 28) that under the Seventh Circuit's interpretation, antitrust defendants will strategically withhold subject-matter objections until appeal. There would be no advantage to be gained from this tactic. Furthermore, in the unlikely event a defendant preferred to seek dismissal on an "easier merits issue" (*ibid.*), *sua sponte* consideration of subject matter jurisdiction provides a backstop, guarding against needless intrusion into the domestic affairs of other nations. See Pet. App. 16a-17a; *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies").[11]

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[11] Any concern about extended proceedings can be alleviated if discovery is limited to the jurisdictional issue and occurs in an expedited fashion. In this case, the judge did not exercise his discretion to employ such procedures, and of the 4½ years, two were

In the face of this overwhelming support for the courts of appeals' unanimous interpretation of the FTAIA, petitioners offer essentially two additional arguments. Neither provides any basis for a different conclusion.

First, petitioners point (Pet. 13-14) to decisions in which this Court has concluded that other statutes do not restrict subject matter jurisdiction. But each case turns on an assessment of the "distinctive statute * * * at issue." *Steel Co.*, 523 U.S. at 91-92. See also *Gwaltney*, 484 U.S. at 55-66 (parsing language of Clean Water Act citizen-suit provision to determine its jurisdictional reach); *Textron Lycoming Reciprocating Engine Div.* v. *UAW*, 523 U.S. 653, 656 (1998) ("By its terms, this provision confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts'"). These cases therefore support the statute-specific approach that we have just discussed.

In *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 644 (2002), the Court refused to find an ouster of jurisdiction in the face of congressional silence. See *ibid.* (jurisdiction not "excluded expressly"). By contrast, Congress has spoken here. That explains why "after the decision[s] in *Steel Co.*" and *Verizon*, "courts of appeals [have] continue[d] to treat FTAIA as jurisdictional." Pet. App. 13a.[12]

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consumed with personal jurisdiction challenges by certain of the foreign defendants.

[12] The FTAIA is a separate statutory provision; accordingly, there is no risk that treating it as jurisdictional will "turn every statutory question" under the Sherman Act "into a question of jurisdiction." *Steel Co.*, 523 U.S. at 92. The FTAIA inquiry turns on the locus of the effects of the challenged conduct, an inquiry divorced from the core elements of an antitrust claim. See H.R. Rep. No. 97-686, at 11, 13 (FTAIA does not affect the merits of antitrust claims); Murphy, *supra*, at 810 ("Proof of [domestic effect] does not prove the substantive violations of the statute"). Petitioners' reliance on

Second, petitioners attempt to invoke (Pet. 15) the doctrine of constitutional doubt, arguing that construing the FTAIA as jurisdictional would create constitutional problems in criminal prosecutions. Of course, this is a civil case, not a criminal one. Moreover, there is nothing constitutionally infirm about applying the FTAIA as a threshold jurisdictional standard in a criminal case. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), and its progeny hold only that any facts which increase the punishment "beyond the prescribed statutory maximum must be submitted to a jury" (*ibid.*), inasmuch as they "operate as the functional equivalent of an element of a *greater offense*,'" *Sattazahn* v. *Pennsylvania*, 123 S. Ct. 732, 739 (2003). Requiring federal courts to determine if anticompetitive conduct has the requisite domestic impact neither authorizes a sentence in *excess* of statutory limits nor takes the evaluation of guilt away from the jury. See *Harris* v. *United States*, 536 U.S. 545, 549 (2002) ("not all facts affecting the defendant's punishment are elements"). Petitioners' constitutional concerns are imagined, not real.

D. Review Is Inappropriate Because The District Court's Decision Makes Clear That The Outcome Of This Case Would Not Change Even Under Petitioners' Interpretation Of The FTAIA.

Even if petitioners prevailed on the issue presented for review, the outcome would not change. For that reason, this Court should not devote its limited resources to reviewing the judgment in this case.

Subsection (2) for the contrary proposition is misplaced. The requirement that the domestic effect "give[] rise to [Sherman Act] claim," 15 U.S.C. § 6a(2), simply "make[s] it explicit that conduct involving beneficial effects is not subject to the antitrust laws." Murphy, *supra*, at 810. See H.R. Rep. No. 97-686, at 11 (no jurisdiction based on "beneficial" U.S. effects).

The court of appeals declined to address our contention that respondents would prevail even under petitioners' interpretation of the FTAIA (Pet. App. 6a),[13] but it is clear from the district court's decision that summary judgment was properly entered for respondents because petitioners did not produce *any* evidence to satisfy the requirement of a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.

As we have discussed, the district court's determination was based on the "undisputed record," replete with admissions by *petitioners'* witnesses and statements in *petitioners'* documents that, to the extent petitioners took any steps towards manufacturing at all, their chemical production facilities, sales, and customers would all have been in India.[14] See Pet. App. 54a-55a, 75a n.7; *supra*, pp. 6-10. Whether analyzed under an "element of the claim" or a "subject matter jurisdiction" framework, the result is the same. These are plaintiffs with claims of injuries sustained in foreign markets. They cannot recover in U.S. courts under any reading of the FTAIA. See H.R. Rep. No. 97-686, at 11 ("a foreign firm whose non-domestic operations were injured * * * would have no remedy under our antitrust laws").

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[13] Petitioners assert (at 25) that the court of appeals recognized that respondents could not prevail under the summary judgment standard, but the court was very clear: "[Respondents], of course, contend that they should win under either standard, *a proposition on which we need pass no judgment.*" Pet. App. 6a (emphasis added).

[14] Because the district court rested its findings on uncontroverted evidence, in particular these documentary and testamentary admissions by petitioners, the record did not establish that a "reasonable jury could conclude" otherwise, as petitioners remarkably contend. Pet. 5. The judge did not simply "credit[] all of the facts alleged by [defendants]" (Pet. 6)—it was petitioners' own words and undisputed conduct that showed the absence of any domestic effect. See Pet. App. 49a, 66a-67a.

It would be a waste of private and judicial resources to determine whether the statute is jurisdictional or substantive in the context of a case in which that determination will make no difference. For this reason too, review by this Court is not warranted here.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

UNITED PHOSPHORUS, LTD., ET AL.,

PETITIONERS,

v.

ANGUS CHEMICAL COMPANY, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ARGUMENT

Respondents' brief in opposition predictably argues that the legal issue decided by the court of appeals is narrow, uncontroversial, and irrelevant to the outcome of this case. A more accurate sense may be obtained by briefly perusing the thoughtful and wide-ranging opinions produced by the deeply divided *en banc* Seventh Circuit, every member of which understood that the issue is important, exceptionally difficult, and squarely presented.

The petition demonstrated that the Seventh Circuit's decision derives from a broader jurisprudence that frequently, if inconsistently, treats the substantive scope of the antitrust laws as a "jurisdictional" issue. It also explained that that entire jurisprudence is a colossal and crucially important mistake that only this Court can now correct. Respondents do not genuinely engage those realities. Instead, they spend the bulk of their opposition rearguing disputed facts in an attempt to manufacture an illusory vehicle problem, and trying in vain to establish that the FTAIA has nothing to do with the Sherman Act.

I. THE SEVENTH CIRCUIT'S DECISION MAY NOT BE DIVORCED FROM ITS CONTEXT AND REASONING

Respondents contend that the petition's discussion of this Court's Sherman Act cases is irrelevant because "the issue decided by the courts below related solely to the FTAIA, not to Section 1 of the Sherman Act." Brief in Opposition at 15. That observation entirely misses the point. Of course this is an FTAIA case. But it simply is not possible to understand the FTAIA, the Seventh Circuit's decision here, or the various other authorities cited by respondents without placing them in their appropriate statutory and jurisprudential context.

The petition explained that context in detail. Briefly: the idea that the commerce-nexus requirements of the Sherman Act somehow affect a court's "subject matter jurisdiction" originated in early 20th-century antitrust decisions. That idea was squarely rejected by this Court in *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923). Imprecise reasoning and loose "jurisdictional" language in various cases and commentary nonetheless continued after *Binderup*. And it is entirely unsurprising that this lax use of "jurisdictional" terminology ultimately infected the interpretation of the FTAIA. As this Court recognized in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 n.23 (1993), the FTAIA was simply designed to amend (or perhaps merely to codify) this Court's prior cases decided under those Section 1 commerce-nexus requirements. There is accordingly no way to interpret the FTAIA without considering that earlier jurisprudence.

And that is precisely how the courts of appeals, including the decision below, have approached this issue under the FTAIA. The Seventh Circuit majority essentially conceded in this case that its "jurisdictional" interpretation of the FTAIA would make little sense on a blank slate. *See* Pet. App. 12a-13a. That court nonetheless felt constrained to accept respondents' view, for reasons which ultimately trace back to the Section 1 jurisprudence that respondents now assert to be irrelevant. For example, the Seventh Circuit's conclusion was clearly driven in part by its belief that this Court adopted the "jurisdictional" interpretation in *Hartford Fire*. *See* Pet. App. 14a. But *Hartford Fire* was, of course, decided under Section 1 rather than the FTAIA—although this Court tellingly regarded the distinction as of little consequence. 509 U.S. at 796 n.23.

The Seventh Circuit also explicitly relied on its (erroneous) conclusion that the pre-FTAIA decisions of this Court and the courts of appeals consistently endorsed a

"jurisdictional" view of the extraterritoriality issue under Section 1. The court stated that the FTAIA "was enacted against a backdrop of almost 60 years of precedent which characterized the application of the Sherman Act to the conduct of foreign markets as a matter of subject matter jurisdiction," and that it "must presume that Congress expects statutes to be read to conform with Supreme Court precedent." Pet. App. 15a-16a. As the petition explained, the Seventh Circuit was actually led astray by loose dicta and "drive-by" jurisdictional rulings. This Court's only actual *holding* on these issues in fact decisively rejected the "jurisdictional" interpretation, *see Binderup*, 263 U.S. at 305-06, and the court of appeals decisions are deeply fractured, *see* Petition at 24-28. But even if it was understandably confused by the Section 1 cases, the Seventh Circuit obviously recognized that any proper understanding of the FTAIA must begin with those cases.

The administrative guidelines, scholarly commentary, and ambiguous legislative history so favored by respondents similarly do not suggest that the FTAIA broke with prior law. Indeed, taken as a whole the legislative history simply confirms this Court's conclusion from *Hartford Fire*—that the FTAIA was merely intended to codify the existing jurisprudence under Section 1. *See, e.g.*, *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 345 (D.C. Cir. 2003) (confirming that FTAIA is a "'simple and straightforward clarification of existing American law'") (quoting H.R. Rep. No. 97-686, at 2 (1982)). Loose references to "jurisdiction" in these materials and other commentary simply express a common understanding derived directly from the Section 1 cases that respondents would now prefer to ignore. Respondents' insistence that the Section 1 history is irrelevant to the FTAIA is little more than willful blindness—a refusal to acknowledge the origins of the very authorities upon which they rely.

Respondents' suggestion (at 15-16) that "concerns unique to the extraterritorial context" make the Section 1 precedents irrelevant in an FTAIA case, and that "[t]he two provisions have completely different statutory language and different statutory contexts," are therefore inconsistent with *Hartford Fire*, with the Seventh Circuit's actual reasoning in this case, and with the authorities cited by respondents themselves. Perhaps respondents meant to say only that the Section 1 cases dealing with *domestic* commerce are irrelevant in this context; but the language of 15 U.S.C. § 1 does not draw or permit that distinction—and it certainly does not appear in the cases. *See* Pet. App. 8a-9a (discussing domestic commerce-nexus cases).

Respondents' assertion (at 15) that "[t]here is no Section 1 issue in this case for the Court to review" is also incorrect. This case was *brought* under Section 1. The FTAIA imposes additional requirements in certain Sherman Act cases, but it is not a separate cause of action. Petitioners must ultimately prove the commerce-nexus elements of Section 1 just like any other plaintiffs; the fact that the courts below have not yet been forced to address whether those requirements have been satisfied (or whether they are "jurisdictional") does not mean the issue is not present in this case, just as it was in *Hartford Fire*. In any event, the jurisprudential tangle described above guarantees that this Court will provide substantial assistance to the lower courts struggling with the parallel issue under Section 1, even if it technically confines its analysis to 15 U.S.C. § 6a.

II. RESPONDENTS' ARGUMENTS ON THE MERITS ARE UNPERSUASIVE

Judge Wood's thoughtful opinion for the four Seventh Circuit dissenters explains well why respondents cannot be right on the merits, but the brief in opposition makes a few new arguments that require a brief response.

First, the petition had pointed out that a jurisdictional

interpretation of the FTAIA would be flatly unconstitutional in criminal cases under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the FTAIA affects the defendant's maximum exposure to criminal punishment. That counsels strongly against respondents' interpretation, since the same statutory language governs civil and criminal antitrust cases. Respondents reply that judicial resolution of the FTAIA issue "neither authorizes a sentence in *excess* of statutory limits nor takes the evaluation of guilt away from the jury," citing *Harris v. United States*, 536 U.S. 545, 549 (2002). Brief in Opposition at 24.

Respondents misunderstand both *Harris* and *Apprendi*. *Harris* holds that factual questions affecting only the defendant's *minimum* sentence may be decided by judges, so long as every fact necessary to authorize the statutory *maximum* is properly found by the jury beyond a reasonable doubt. But the effect on domestic commerce required by the FTAIA is one of the facts that must be proven before the Sherman Act authorizes any punishment at all; if that effect is not present, the U.S. criminal antitrust laws "shall not apply." Denying the defendant a right to jury trial and proof beyond a reasonable doubt on a fact that determines the line between criminal behavior and entirely lawful conduct is a core violation of *Apprendi*.

Respondents also argue that the "shall not apply" wording of 15 U.S.C. § 6a demands a jurisdiction-stripping interpretation as a matter of plain language. Yet it is hard to imagine a clearer way for Congress to say *the opposite*—i.e., that the statute simply does not cover the conduct in question—than "shall not apply." Respondents cite only one decision of this Court in support of their position, *see* Brief in Opposition at 18 n.8, and they misstate its holding.[1]

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[1] *New Jersey v. N.Y. Susquehanna & W. R.R.*, 372 U.S. 1, 7 n.5 (1963), actually stated that:

Finally, respondents also suggest that "sound judicial administration" favors a jurisdictional interpretation, because early dismissal of foreign-conduct antitrust cases will prevent "unnecessary and burdensome litigation in our courts." Brief in Opposition at 21. It is certainly a virtue of true jurisdictional issues (such as diversity or the well-pleaded complaint rule) that they can be disposed of quickly and efficiently. That is why this Court has repeatedly stated that "in most instances subject-matter jurisdiction will involve no arduous inquiry." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999); *see also, e.g., Bell v. Hood*, 327 U.S. 678, 685 (1946) (subject matter jurisdiction exists whenever "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another").

But as the history of this case illustrates, placing a "jurisdictional" label on what is in fact a complex merits issue does not save time or judicial resources. This case was filed on April 4, 1994. Nine and a half years later, it is hard to see how a jurisdictional treatment of the FTAIA issue has helped to expedite the litigation.

In fact, complicated jurisdictional inquiries overlapping with the merits will more often *increase* delay and inefficiency, by preventing the court from disposing of the

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H.R. 12832 provided that: "this section [§ 13a] shall not apply to the operations of or services performed by any carrier by railroad on a single line of railroad located wholly within a single State." 104 Cong. Rec. 12547. *Also*, the House bill eliminated the Interstate Commerce Commission's jurisdiction over discontinuance of stations, depots and other facilities . . . .

(Emphasis added; alteration in original.) The word "also" shows that the language the Court quoted was not the language that "eliminated the Interstate Commerce Commission's jurisdiction over discontinuance of stations, depots and other facilities." Moreover, the scope of the ICC's "jurisdiction" is not subject-matter jurisdiction in the judicial sense.

case on an easier merits issue, or by requiring that the same issues be tried twice. *See* Pet. App. 25a-26a (Wood, J., dissenting). That is particularly true in this context, since the FTAIA does not merely overlap with the merits—it is completely coextensive with the merits. The FTAIA is not satisfied unless the conduct in question has the required effect on U.S. commerce *and* otherwise "gives rise to a claim" under the Sherman Act. 15 U.S.C. § 6a. A "jurisdictional" interpretation of that statute will therefore require judges to consider the full range of potential merits issues in foreign commerce antitrust cases under the guise of determining whether they have jurisdiction to entertain the case at all. *See* Pet. App. 36a (Wood, J., dissenting). That is not only inefficient but turns the entire concept of jurisdiction—power to decide the case either way—on its head. *See Bell*, 327 U.S. at 682 ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").

III. THERE IS NO OBSTACLE TO THIS COURT'S CONSIDERATION

Respondents argue at length that the district court either granted summary judgment in the alternative or would have if it had reached the issue. Even if true, respondents' argument would be irrelevant. This Court accepts review to decide important questions of law. It frequently grants certiorari in order to clarify the applicable legal standard, and then remands for application of that standard, without any concern for whether a particular litigant's case will ultimately stand or fall. The Seventh Circuit squarely decided the primary issue, while reserving decision on any potential alternative grounds. There is therefore no obstacle to this Court's consideration.

In any event, respondents' suggestion that the *en banc* Seventh Circuit intentionally wasted its own time is inconsistent with the record. The magistrate judge did not in fact grant summary judgment in the alternative. His opinion clearly states that he was granting the "motion to dismiss . . . for lack of subject matter jurisdiction," and that it was accordingly "unnecessary to consider the other motion argument(s) of [respondents]." Pet. App. 79a & n.11. That opinion also contains no discussion of the standards appropriate to a summary judgment decision. In context, the brief reference to summary judgment in the accompanying minute order is plainly a clerical error.

As the Seventh Circuit obviously recognized, the magistrate could not have granted summary judgment to respondents in any event. The opposition repeatedly quotes one sentence in the Seventh Circuit's opinion acknowledging that the court "need pass no judgment" on respondents' contention that they would have prevailed on either standard. Obviously that is correct, given how the Seventh Circuit decided the case. But the majority's opinion leaves no doubt that if it *had* been forced to confront the issue, it would have rejected respondents' argument. The court stated that "[t]he primary issue involves whether the relevant provision of FTAIA is jurisdictional or whether it states an additional element of a Sherman Act claim. This in turn affects how a court deals with it and, *in this case, what the outcome will be.*" Pet. App. 2a (emphasis added). "We think it is fair to say that in this case the procedure employed will dictate the result." *Id.* at 5a. And four judges dissented, indicating a belief that a different resolution of the "primary issue" would change the result on appeal.

The Seventh Circuit's apparently unanimous impression on this issue was correct. Even leaving aside respondents' one-sided discussion of the record relating to AB and 1-NP, there are clearly disputed issues of material fact relating to

petitioners' plans to manufacture Tris Amino and AMP. There is no basis, beyond respondents' say-so, for claiming that "tris amino and AMP . . . were at the periphery of the case in the district court." Brief in Opposition at 6. As the petition explained, when it served their purposes in the Cook County lawsuit, respondents insisted that petitioners planned to manufacture Tris Amino and AMP. The jury is entitled to treat that as an admission under Seventh Circuit caselaw. Petition at 5 (citing cases). And undisputed documentary evidence in the record showed that petitioners had concrete plans to manufacture those chemicals and always understood that the primary market for them was in the United States—where ANGUS itself sells almost $30 million per year. *Id.* at 5-6 (collecting record citations).

Respondents muster essentially two responses. First, they assert that even if petitioners did plan to make Tris Amino and AMP, they did not prove any intent to sell those chemicals *in the United States*. Brief in Opposition at 9 n.2. That is simply inconsistent with the record—which shows that the United States is the largest market for those chemicals, and that petitioners understood that the business opportunity was primarily in the U.S. market. Second, they claim that petitioners had undertaken no "research and development efforts" relating to Tris Amino or AMP, and had not yet identified U.S. buyers for those products. *Id.* at 8-9. But the record is full of evidence that petitioners' progress on those fronts was interrupted by respondents' anticompetitive actions—the filing and prosecution of the Cook County lawsuit[2] (including amending their complaint to seek punitive damages when petitioners tried to pursue

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[2] *See, e.g.*, R. 431/I Miller Dep. at 92-93, 191, 260, 271-73, 283-86, 302, 336-38, 362, 406-07, 549-50, 627, 644-45, Shroff Dep. at 136, 158-59, 445, 475, 550-51.

their plans while the lawsuit was pending),[3] and respondents' threats of further litigation, even after they had voluntarily dismissed the lawsuit, if petitioners persisted in their plans to enter the markets for nitroparaffins and nitroparaffin derivatives.[4]

IV. ALTERNATIVELY, THIS PETITION SHOULD BE HELD FOR *EMPAGRAN*

As respondents point out (at 20-21 n.9), the D.C. Circuit recently denied a petition for rehearing in *Empagran*, which addresses a separate FTAIA question about which there is a deep and acknowledged circuit split. *Empagran* will be an excellent candidate for certiorari, and the appellees have stated publicly that they intend to file a petition with this Court. *See* Lily Henning, *Antitrust Goes Global*, Legal Times, Oct. 13, 2003, at 22. That petition is due on December 10, 2003.

The threshold issue decided by the Seventh Circuit here is implicit in *Empagran*, but it was not briefed or argued in that case. Petitioners therefore respectfully suggest that it would aid this Court's consideration to hear both cases at the same time, and that if this Court is uncertain about whether to grant review in this case it should defer consideration of this petition pending a decision on certiorari in *Empagran*.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted or, in the alternative, held pending this Court's consideration of *Empagran*.

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[3] R. 431/X(A) Ex. H ¶¶ 40, 60, 65, p. 27 ¶ (c).

[4] R. 431/II at D022894; R. 431/I Miller Dep. at 666, Pals Dep. at 129, Shroff Dep. at 449, 477, 704-05, 718-19.

Respectfully submitted,

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